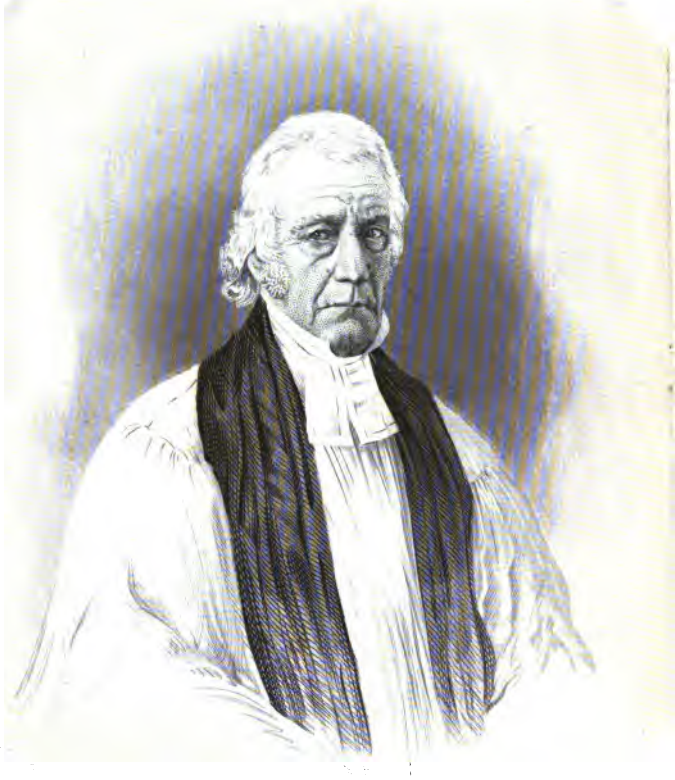

REV. HARRY CROSWELL, D. D.

Rector of Trinity Church, New Haven, Ct.

THE

SPEECHES

AT FULL LENGTH

OF

MR. VAN NESS, MR. CAINES,

THE ATTORNEY-GENERAL, Mr. HARRISON,

AND

GENERAL HAMILTON,

IN THE

GREAT CAUSE

OF THE

PEOPLE,

AGAINST

HARRY CROSWELL,

ON AN INDICTMENT FOR A

LIBEL

ON

THOMAS JEFFERSON,

PRESIDENT OF THE UNITED STATES.

New-York:

PRINTED BY G. & R. WAITE, NO. 64, MAIDEN-LANE.

1804.

Arguments

IN THE

GREAT CAUSE

OF THE

PEOPLE,

AGAINST

HARRY CROSWELL.

THIS was an issue of traverse upon an indictment, found at the general sessions of the peace for the county of Columbia, in the term of January last, and removed into the Supreme Court by Certiorari, and tried before his honor the Chief Justice, at the Circuit in Columbia, in July last. Previous to the commencement of the trial, an application was made to put it off upon the following affidavit.

Columbia County, } *ss.* HARRY CROSWELL, the defendant in the above cause, being duly sworn, deposeth and saith, That James Thompson Callender, of the State of Virginia, is a material witness for this deponent, without the benefit of whose testimony, as he is advised by his counsel, and verily believes, he cannot safely proceed to trial.—That this deponent expects to be able to prove, by the said James Thompson Callender, *the truth of the charge set forth in the indictment* against this deponent, so far forth as this: That the said James Thompson Callender was the writer of a certain pamphlet called "*The Prospect before us,*" and that he caused the same to be printed and published—That Thomas Jefferson, Esquire, President of the United States, well knowing the contents of the said publication, called "*The Prospect before us,*" paid, or caused to be paid to the said James Thompson Callender, the two several sums of fifty dollars; one of which sums was paid, prior to the publication of the said pamphlet, for the purpose of aiding and assisting him the said James Thompson Callender in the publication thereof, and the other subsequent thereto, as a reward, thereby shewing his, the said Thomas Jefferson's approbation thereof; and this deponent further saith, that in the said publication called the "Prospect before us," George Washington, Esquire, late President of the United States, deceased, is charged in effect with the several crimes in the indictment aforesaid mentioned, and that John Adams, Esq. late President of the United States, is therein expressly declared to be a hoary headed incendiary.—And this deponent says it has been wholly out of his power to procure the voluntary attendance of the said James Thompson Callender at this Court, though he had, at the last Court of the General Sessions of the Peace in this County, and since, until a few days past, good reason to believe, that he would attend as a witness at this court. And this deponent also says, that he expects to be able to procure the voluntary attendance of the said

James Thompson Callender at the next Circuit Court, to be held in and for this County, and that he will bring with him two letters from the said Thomas Jefferson, to the said James Thompson Callender, wherein he expressed his approbation of a certain publication, then about to be printed by the said James Thompson Callender, which publication this deponent expects to be able to prove, by the said James Thompson Callender, was, "*The Prospect before us*," unless the said Court should grant a commission to examine the said James Thompson Callender, upon an application which this deponent intends at the next term to make for that purpose. The application being over-ruled by his honor the Chief Justice, the Indictment which charged as follows, was read.

Columbia County } ss. At a Court of General Sessions of the Peace, holden, &c. It is represented THAT HARRY CROSWELL, late of the City of Hudson, in the County of Columbia aforesaid, Printer, being a malicious and seditious man, of a depraved mind and wicked and diabolical disposition, and also deceitfully, wickedly, and maliciously devising, contriving, and intending, Thomas Jefferson Esq. President of the United States of America, to detract from, scandalize, traduce, vilify, and to represent him, the said Thomas Jefferson, as unworthy of the confidence, respect, and attachment, of the people of the said United States, and to alienate and withdraw from the said Thomas Jefferson Esquire, President as aforesaid, the obedience, fidelity, and allegiance, of the Citizens of the State of New-York, and also of the said United States; and wickedly and seditiously to disturb the peace and tranquility, as well of the People of the State of New-York, as of the United States; and also to bring the said Thomas Jefferson, Esquire, (as much as in him the said Harry Croswell lay) into great hatred, contempt, and disgrace, not only with the people of the state of New-York and the said people of the United States of America, but also with the citizens and subjects of other nations; and for that purpose the said Harry Croswell, did on the ninth day of September, in the year of our Lord one thousand eight hundred and two, with force and arms, at the said city of Hudson, in the said County of Columbia, wickedly, maliciously, and seditiously, print and publish, and cause and procure to be printed and published, a certain scandalous, malicious, and seditious libel, in a certain paper or publication, entitled "*The Wasp*;" containing therein, among other things, certain scandalous, malicious, inflammatory, and seditious matters, of and concerning the said Thomas Jefferson Esquire, then and yet being President of the United States of America, that is to say, in one part thereof according to the tenor and effect following, that is to say: Jefferson, (the said Thomas Jefferson Esquire meaning) paid Callender, (meaning one James Thompson Callender) for calling Washington (meaning George Washington Esquire, deceased, late President of the said United States) a traitor, a robber, and a perjurer; for calling Adams (meaning John Adams Esquire, late President of the said United States) a hoary-headed incendiary, and for most grossly slandering the private characters of men, who he (meaning the said Thomas Jefferson) well knew to be virtuous, to the great scandal and infamy of the said Thomas Jefferson Esquire, President of the said United States, in contempt of the people of the State of New-York, in open violation of the laws of the said State, to the evil example of all others in like case offending, and against the peace of the People of the State of New-York, and their dignity.

On the part of the prosecution, it was proved, that the defendant was

the editor of a Newspaper entitled "*The Wasp*," a series of which were printed and published in the City of Hudson. In one of them (number seven) was contained a piece, from which was extracted the matter charged in the indictment as the libel, the whole of which piece was read by the prosecutor, in the following words: "Holt says, the burden of the federal song is, that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false. The charge is explicitly this: Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer; for calling Adams a hoary-headed incendiary; and for most grossly slandering the private characters of men, who he well knew were virtuous....These charges not a democratic editor has yet dared, or ever will dare to meet in an open and manly discussion." It was further proved on the part of the prosecutor, that a file of the Wasp, from number one, to number twelve inclusive, was purchased at the office where they had been printed; from number one, to number five, had been sold by the defendant, and the residue by one of the journeymen in his office. The prosecutor then called a witness to prove the truth of the inuendoes; to this the counsel for the defendant objected; the Chief Justice over-ruled the objection. The witness was then examined and testified that he understood the epithets Jefferson, Washington, and Adams, mentioned in the alleged libel to be as stated in the inuendoes in the indictment, and that he had seen similar charges, in other papers, previous to the publication in the Wasp; which was one of the reasons which induced his opinion, that the inuendoes were correct. The prosecution being rested on this evidence, the defendant offered to prove, that he had no agency in devising, writing, or inditing, the publication in question, and that the same was handed to be printed to a person in his employ, and in his absence, without his knowledge. To the introduction of this testimony the prosecutor objected, and the Chief Justice refused to receive the same, unless the defendant meant also to prove, that he was not prior to the printing and publication of the alleged libel. This the defendant's counsel did not offer to prove. The defendant's counsel proceeded to sum up the evidence and read a paragraph in the Bee, a Newspaper printed in the City aforesaid, by Holt, the person in the alleged libellous piece mentioned, to shew that he declared the burthen of the federal song to be such, as mentioned in the libel. Though this, had not been previously proved or read in evidence, it was not objected to. In the course of the summing up on the part of the prosecution, the Attorney General offered to read certain passages from number seven of "*The Wasp*," and the prospectus contained in the first number, which had not before been shewn or pointed out to the defendant's counsel or read in evidence....To this objections were made, but the Chief Justice decided that the prosecutor had a right to read such passages from such numbers of the Wasp as he thought fit. The Attorney General accordingly read, in order to shew the intent of the defendant in publishing the alleged libel, to be such as charged in the indictment, from number one of the Wasp, the prospectus, and another piece from number seven, in neither of which passages was there any thing alleged against Thomas Jefferson, in his private or official capacity. The Attorney General further stated, that from an examination of every number of the Wasp, it would be manifest, that the intent of the defendant was malicious. The Judge charged the Jury among other things, that particularly on trials for libels they were not the judges of the law and the fact; and that in cases of libel

only.* Could the Court set aside a general verdict of guilty, if the indictment set forth nothing in their judgment libellous.

His honor then read to the Jury the opinion of Lord Mansfield in the case of the Dean of St. Asaph, as reported in a note in third Term Reports, and charged the Jury that the law therein laid down, was the law of this state. That it was no part of the province of a Jury to inquire or decide on the intent of the defendant; or whether the publication in question was true, or false, or malicious. That the only questions for their consideration and decision were; first, whether the defendant was the publisher of the piece charged in the indictment; and second, as to the truth of the inuendoes. That if they were satisfied as to these two points, it was their duty to find him guilty.... That the intent of the publisher, and whether the publication in question was libellous or not, was, upon the return of the Postea, to be decided *exclusively* by the Court, and therefore it was not his duty to give an opinion to them on these points; and accordingly no opinion was given.

Upon the foregoing case the following grounds were relied on for a new trial.

I. Because the trial ought to have been put off, in order to give an opportunity to the defendant to procure the testimony in the affidavit mentioned.

II. That the piece alleged to be libellous, and which was read in evidence from number seven of the Wasp, is materially and substantially different from that charged in the indictment, and the piece so read is not libellous.

III. That the admission of proof, of the truth of the inundoes was improper.

IV. That the defendant ought to have been permitted to prove that he was not the author of the alleged libellous piece, and that the same had been handed to another person to be printed in his absence.

V. That the permission given to the Attorney General to read to the Jury certain passages from numbers of the Wasp, other than number seven, was improper.

VI. For misdirection by his honor the Chief Justice, in his charge to the Jury in this, that he charged the Jury, that particularly in cases of libel, they were not the judges of law and fact....That in cases of libel only, could a Court set aside a general verdict of guilty. That the law, laid down in the case of the Dean of St. Asaph, is the law of this State. That the intent was simply a question of law, and therefore not to be left to the Jury, but to be decided exclusively by the Court on the return of the Postea. And that whether the piece in question was libellous or not, was not to be decided by the Jury; and because the Judge did not, as he ought to have done, give his opinion to the Jury on the point last mentioned.

MR. VAN NESS.

IT has been assigned to me, to open to the Court, the grounds upon which the defendant relies for a new trial. In reflecting upon the immense importance of the principles which are to be investigated; the interesting nature of the questions which the discussion involves, and, above all, how much depends upon a correct decision of them, I feel an oppression and dismay, the discouraging operations of which, I have in vain attempted to resist.

* On the argument, the Chief Justice said his charge was not in this respect accurately stated: That it was thus, "In cases of libel, the court could only set aside a general verdict of guilty."

The mighty theme demands an abler advocate, but such as I am, I proceed to discharge the duty imposed upon me.

The first ground upon which we rest this application, is, that the trial ought to have been put off at the circuit, upon the facts stated in the defendant's affidavit. This necessarily draws into discussion, the question, whether, by our law, truth *can* be a libel—to shew that it *cannot*, I rely on the following authorities and reasons.

I. The antient British Statutes; which were in affirmance of the common law.

II. All the antient precedents, of indictments and informations, charge the matters alleged to be libellous, among other things, to be *false*.

III. The Court never will give the public prosecutor leave to file an information for a libel, unless accompanied by an affidavit, to shew, that the publication is false.

IV. To publish truth cannot be libellous in any country having a free and elective form of government.

The first statute which is now to be found on the subject of libels, is that of West: 1. third Edward 1st, chapter 34th, passed A. D. 1275, it is in these words, viz. "For as much as there have been oftentimes found in the "country devisers of tales, whereby discord hath many times arisen between "the King and his people, or great men of the realm, it is commanded "that from henceforth none be so hardy to tell or publish any *false* news or "tales, whereby discord; &c. between the King, &c." The punishment inflicted by this statute, is, that the defendant be imprisoned, till he find his author, and bring him into Court.

The next statute is 2, Richard 2d, chap. 5, A. D. 1378. This statute prohibits the telling or publishing "*false news or lies, or other false things.*" This act extends the provisions of the foregoing act to "Prelates, Dukes, "Barons, and other nobles and great men of the realm, the Chancellor, Trea-"surer, Clerk of the Privy Seal, Steward of the King's Household, Justices of "the one Bench or the other, and other great officers of the realm." The punishment is to be according to the preceding act.

The next statute is 12th, Richard 2d, Chap. 11th, A. D. 1388. This act recites the two former statutes, re-enacts them, and provides further, that if the offender cannot find his author he shall be punished himself.

The next statute is 1 and 2, Phi. and Ma. Cap. 3d, A. D. 1554. This re-enacts the first statute, (3d, Ed. 1 Cap. 34) and gives Justices of the Peace cognizance of offences against it. The words made use of are: "if any person shall be convicted or attainted of speaking *maliciously*, of his own imagination, any *false*, seditious, or slanderous news, sayings, or tales of the King or Queen, &c. &c."

This statute prescribes new and sanguinary punishments, such as cutting off the ears of the offender for speaking, &c, and his right hand for printing, &c.

Thus from the year 1275 to 1554, stood the statutory provisions in cases of libel. Convictions under these statutes will be found in the books, vide, Oldnoll's case, Dyer, 155, S. C. Jenkins' Reports, 5th century, case 55, 4th and 5th, Phi. and Ma. This was an indictment against the defendant for horrible and slanderous words, &c. *contra formam diversorum statutorum*.... The defendant was "convicted, fined, ransomed, and imprisoned, until he should find his author," according to the statute 3d, Ed. 1st, cap. 34.

Another case is reported by Lord Coke, in 3d Inst. 174, in Mich. term 18th, Ed. 3d. This was an indictment against John De Northampton, an

Attorney of the King's Bench, for *writing a letter* to one of the King's Council, (De Ferrers) containing much libellous matter "which said John being called, confessed, &c. Judicium Curiæ, et quia predictus Johannes cognovit dictam Literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quia litera continet in se nullam veritatem, &c.—The defendant was imprisoned and bound for his good behaviour.

This last case is important for many reasons.

First. It shews that falsehood was, at that, time a necessary ingredient to make any publication libellous.

Second. No surer test an ancient principle of law can be resorted to, than the antient precedents. In this case the defendant was convicted on his own confession, and as the indictment must have stated the contents of the letter which the defendant wrote to be *false*, he by his confession admitted it to be so; and accordingly we find, in the record, that the reason which the Court gives for their judgment is that the letter contained in itself, nullam veritatem.

Third. It is a precedent of an early date, and shews most clearly that, at that period, a publication to be libellous, must be false.

These statutes created no new crime; they were in affirmance of the pre-existing common law.

In 2d. Inst. 226, 227, the writer, in a comment upon the statute of West, 1st (first statute before cited) says, before this statute, in the reign of King Henry the third, two kinds of persons were authors of great discord and scandal in two several degrees; first, men that did raise and imagine, out of their own heads, *false bruits* and *rumours*; and others that reported, and spread the same, whereby discord and scandal, &c. &c. It is there stated, among other things, that King Edward 1st, finding by dangerous experience, the woful effects of such *false* rumors and reports, &c. &c. did thereupon make this law for redress, both for the devising, and spreading of such *false rumors and bruits*, in all mild and temperate manner, both for the style and punishment, *rather leaving the same to the censure of the common law*, (which all men willingly obey) than by inflicting any new punishment; which moderation of our king, *leaving* the punishment to fine and imprisonment, was the greater, for that the *ancient Law of England before the conquest was much more severe and rigorous*, as by a few examples shall appear, &c." It will be seen, by this case, that the first statute cited clearly did not create a new crime, but was explanatory of and in affirmance of the common law. For although this is not expressly stated, yet it is conclusively implied. But there is an authority clear and express, which proves my proposition beyond all doubt. In a case reported in 2d Mod. 161, 162, Cas. 28th. 29 Car. 2d. Atkyns, Justice, expressly declares, that all these statutes against scandalum magnatum, were in affirmance of the common law; that no new offence was created by them; that libels were punishable at common law, &c.

If this position be correct, it follows, that falsehood, as the common law then stood, was necessary to make a publication or rumor, &c. libellous. This is strongly supported by the case cited from 3d institute, 174, containing the form of the record, which was clearly a prosecution at the common law.

In 4th State Trials, 573, Reg. vs. Fuller, it will be perceived that Holt, Chief Justice, repeatedly called upon the defendant to know, whether he could prove what he had published to be true; intimating, that if he offered such evidence it would be received.

Fourth State Trials 349, 7 Bishop's case; Powell, Justice, a good lawyer, a sound politician, and as is said by Lord Camden, in 2d Wil. Rep. Rex vs. Wilkes, the only honest man then on the bench, lays it down, that a publication to be libellous must be *false*, it must be malicious, it must tend to sedition.

Hobart, 252, Star Chamber, Lake vs. Hatton, in this case, Sir Edward Coke, the Attorney General, held, that truth was a justification, Hobart, Justice, denied it.

If, however, there should be any doubt on this subject, it is removed by one of the most unequivocal decisions of which the case admits. The supreme legislature of the union has declared, that by law, truth is a justification. I allude to this Law of the United States, passed in the year 1798, called the sedition act. By a recurrence to the statute, it will be found, that *that* part of it which permits the truth to be given in evidence is *declaratory*, and the other parts remedial. Ought this Court to doubt after this solemn declaration of the nation on this point? And is it not bound to regard it as conclusive on this subject? Is it proper to call in question a decision thus made? This is an authority pure and unadulterated; above all, it is American.

The first case in which the Judges in England attempted to subvert the established law, in cases of libel, was in the Star Chamber; a tribunal justly abhorred for its cruelty, injustice, and usurpation, and which was annihilated as soon as the voice of reason was permitted to be heard; it was held in the case that a publication *might be libellous though true.*—Want's case, Moor Rep. 627. The Judges went no further at that time; one innovation however having been made, it was easy for those in power to go one step further. Accordingly it was soon after decided that "It is not material whether the libel be true."—5 Coke, Rep. 365, in the Star Chamber.

Thus the common law, as previously established, was trampled under foot by the most corrupt court that ever existed in England. This Court founded in usurpation, the humble tool of despotism, did not blush to declare that the publisher of *truth*, and the publisher of *falsehood* were equally guilty, and equally merited the censure of the law. A heresy in morals as well as politics. A principle at war with the spirit of our law; and invented by the supple instruments of power, for the purpose of suppressing inquiry into the conduct of *rulers*, in order more easily to enslave the *ruled*.

This doctrine, originating in the Star Chamber, has since been adhered to by the Courts in England; and it is acknowledged, with the exceptions of Holt, Chief Justice, and Justice Powell, in the cases heretofore cited; no case can be found since the Star Chamber usurpations *where truth has been held to be material.* On the contrary, that out of the doctrine another rule has grown, that the *greater the truth the greater the libel;* than which, a more despotic and pernicious principle, cannot be found in the codes of Turkey or Russia.

Second. It will be found that by the ancient precedents, as well of informations as indictments, that the libel was always charged to be *false*. This is a strong argument to shew, that, as it was a necessary allegation, it ought to be proved; and if the libel were proved to be true, it could not be punished.—Rex vs. Carr K. B. A. D. 1680, 2d State Trials.—Same year, 2d State Trials, 90 Rex vs. Elizabeth Collins. Cowp. Rep. Rex vs. Horne, 672, A. D. 1777.

Many other precedents might be cited to this effect; but as they will not probably be denied, those mentioned will suffice. From the year 1680

to 1777, it may be safely affirmed, there is not a precedent of an indictment, or information in which the word *false* has been omitted.

Third. At this day, the Court will never grant leave, to the Attorney General, to file an information for a libel, unless accompanied with an affidavit to shew that it is *false*. The case in Doug. 387, among many others, is full to prove this; and the Court there say the rule is invariable.

Fourth. It cannot in a free country be criminal to publish truth, affecting the moral or political conduct, or principles of any man.

That part of the common law which is repugnant to the constitution is abrogated.

Among the privileges secured to us by the Constitution, that of electing all public officers is the most important. Our Constitution is representative throughout, and every public agent is responsible to the people, either directly, or indirectly. In order to the due exercise of the elective franchise, free inquiry is indispensibly necessary; but if the vices and corruptions of those in power, can be shielded from public animadversion, by the terrors of a despotic, and arbitrary principle of the modern law of England, the rights of election is a mere nothing. It is the worst of curses, because, under the supposed sanction of public opinion, the greatest enormities and oppressions are practised. If therefore it be criminal to publish the mal-conduct of our rulers, if it be libellous to expose their depravity and want of every moral qualification for office, it were better at once to declare, that the right of the people to choose their rulers shall be abrogated. The people are more interested in having the vices of their agents made known, than their virtues; the former are always attempted to be concealed, the latter speak for themselves and ever will become public. It is clearly to be demonstrated, that, if the doctrine be once established, that truth is a libel, there is an end to the liberty of the press. But as my duty is merely to open the argument, I shall not dilate further on this most conclusive and unanswerable part of it.

The next ground upon which we rely, is, that the Chief Justice misdirected the Jury, in requiring them to find the defendant guilty upon the mere proof of publication, and the truth of the innuendoes.

We contend first, that in all criminal cases, the Jury under the charge of the Court as to the law, have the rightful power of deciding both upon the law, and the fact.

Second. That in all cases where a general issue is joined, the Jury has a right to find a general verdict in the whole matter in issue.

In Bushell's case, Vaughan 150, the rights and powers of jurors are ably and fully discussed and defined, Vaughan there says: "But upon all "general issues, as upon Non. Cul. pleaded in trespass, Nil Debet in debt, "Nul Tort in Disseisin, and the like, though it be matter of law whether the "defendant be a trespasser, a debtor, a disseisor, &c. in the particular cases "in issue: Yet the Jury find not, as in a special verdict, the fact of every "case by itself, leaving the law to the Court, but find for the plaintiff or de"fendant upon the issue to be tried: *wherein they resolve both the law and the "fact complicatedly, and not the fact by itself*; so as, though they answer "not singly to the question, what is the law? *yet they determine the law*, in "all matters where issue is joined and tried in the principal case, but where "the verdict is special. &c."

Many more cases might be cited to the same point, but this is unnecessary; one more only will be added; it is the opinion of an American Judge, an honest man, a profound statesman, whose legal learning and deep

research is not exceeded in this, or perhaps any other country. The late Chief Justice Jay in a case reported, in 3 Dall. 4. in charging the Jury, says—

"It may not be amiss here, gentlemen, to remind you of the good old "rule, that on questions of fact, it is the province of the Jury; on questions "of law, it is the province of the Court to decide. But it must be observed, "that by this same law, which recognizes this reasonable distribution of ju- "risdiction, you have, nevertheless, a right to take upon yourselves to judge "of both, and to determine the law, as well as the fact in controversy. On "this, and on every other occasion, we have no doubt you will pay that res- "pect which is due to the opinion of the Court; for, as on the one hand, it is "presumed that Jurors are best judges of facts, it is, on the other hand, pre- "sumable, that the Court are the best judges of law.—*But still both objects "are lawfully within your power of decision.*"

The opinion of this great man, at the head of the national judiciary, who was no stranger to the rights and powers of the Court, ought to receive the highest consideration; more especially when it is known, that he formed his notions of jurisprudence at a time when modern theories had not supplanted the maxims of experience.

It is admitted by all the Judges in England, who gave the Jury similar directions with those of the Chief Justice in the present case, that the Jury has the *power* to judge as well of the law as the fact; but that this *power*, is like that of a highwayman, who robs those too weak to resisit him.

But to shew that it is not this *kind of power* which the Jury possesses, in addition to the authorities already cited, and which will be adverted to hereafter, we contend,

First, In all criminal prosecutions the Court cannot, as in civil cases, grant a new trial when there is an acquittal. The verdict is final, and not in the power of the Court. This rule even Lord Mansfield does not pretend to deny, although to him is due the merit of establishing the usurpation, which took libels out of the general rule.

Second, The Jury never was in criminal cases liable to an attaint—*Bushell's Case, Vaughan*, 150.

If then, the Court cannot set aside a verdict of acquittal, and the Jury cannot be punished for giving such a verdict, though it be directly against law and evidence, and if their verdict is completely final and effective, does it not follow that they must have this power *rightfully?*—If rightfully, it is their solemn duty to exercise it.—When speaking of the power of the Jury, no other power can be meant than that which they can legally and rightfully exercise. It is like the power of the executive, the legislative, and the judicial departments of our government; and though their powers may be, and doubtless sometimes have been abused, they do not therefore cease to exist. So, although a Jury may do wrong, they have not therefore less the power of doing right. And wherever there is lodged a power to decide, which is final and effective, and from which there is no appeal, that power is a rightful one, and must necessarily be so understood.

That the Court has a right to decide the law, and the Jury the fact, is, as a general principle, undoubtedly true. Whenever a mere question of law is presented to the Court, as in cases of demurrer, the Court exclusively decides. Formerly it was necessary to plead all special matter; most of the causes at that time eventually came before the Court in the shape of demurrer: the facts being thus spread upon the record, and agreed to by the parties, the Court, and the Court only was competent to decide. In

all these cases, therefore, the Judges unquestionably have the sovereign controul of the cause.

But at this day, since the statute, when the general issue with notice is universally adopted, the intervention of a Jury is more frequently necessary. The power of the Court must of course be exercised differently; the Jury must first find the facts: this being done, they in civil cases always, and in criminal most generally, ought to take from the Court the legal inferences from the facts. It is therefore the universal practice, and such it must necessarily be, for the judge to direct and instruct the Jury in every case, what the law is; and they are to apply it to the facts, and find their verdict accordingly. As long as the Jury have the power to find a general verdict, the judicial power, of expounding the law, can be exercised in no other way. The law has designated this mode, and it recognizes no other. In civil cases to be sure the law has provided a remedy against the injustice which sometimes, though rarely, results from an improper decision of the Jury. Formerly they might be punished; now their verdict is set aside, and a new trial granted. But in criminal cases there was no such relief, nor any punishment. Lord Mansfield, though it is not with much pleasure that *his opinions*, as to the *right of Juries*, are cited, says, (3d Term Reports, 431 in note) "It is the duty of the judge in all cases, upon general issues, to tell the "Jury how to do right, though they have it in their power to do wrong, which "is a matter between God and their consciences." Lord Mansfield never forgot the hand that raised him above the people. The trial by Jury is the pride of Englishmen.—It is the great bulwark which protects the rights of the subject against the influence, the oppression, and the persecution of the crown. It, more than any thing else, has a tendency to keep the royal prerogative within its proper bounds, and is therefore regarded as the most invaluable privilege which the nation has inherited. To destroy and fritter it away, seems to have been the darling object of Lord Mansfield; and, in executing this goodly work, he meant to give his benefactor, the highest evidence of his gratitude. We find accordingly, that during his administration the Court became every thing, the Jury nothing. In cases of prosecutions for libels, he out-stripped all his predecessors; and he soon introduced a practice, which, if it could have been firmly established, must have prostrated the liberty of the press. The patriotism of the nation was at length roused into action; and had he lived a few years longer, he would have witnessed as noble and as dignified a resistance as ever was made by a free people. The rights of the Jury were vindicated, and the liberty of the press established on a basis, which no future Mansfield will readily dare to undermine.

It is however said, that the case of libels forms an exception to the law in other criminal cases; and authorities will be adduced to prove, that it has been usual to direct a Jury to find the defendant guilty, upon the mere proof of publication, and the truth of the inuendoes—among which the following are the most prominent:

Ninth State Trials, 255. Lord Raymond's opinion—His lordship says, there are, in cases of libels, two questions for the Jury, and one for the Court, Whether the publication be libellous or not, is for the Court—and directed the Jury, in their deliberations, to lay that out of the question.

Fifth Bur. 2661. Woodfall's Case. Where the same doctrine is laid down by Lord Mansfield.

Third Term Rep. 431, in note. Dean of St. Asaph's Case. In

this case the doctrine is again enforced by Lord Mansfield, and zealously defended.

Each of these cases will be noticed in their order.

Lord Raymond is the first judge who gave such a direction. Before this, no case can be found where a similar doctrine was held; and it will be seen in the sequel, that his solitary opinion, given in the hurry of a trial, when alone, in all probability, on the bench, cannot of itself overturn certain established, acknowledged, and admitted principles. In Woodfall's case it will be seen, that the Jury found in exact conformity with the charge, to wit, "guilty of printing and publishing *only*."—They were told by Lord Mansfield that if they found that the defendant was the publisher, and the application of the inuendoes to persons and things correct, they should find the defendant guilty. The Jury answered by their verdict that they found these facts; yet it will be found that on this verdict, Lord Mansfield himself dared not give judgment, and consented that there should be a venire de novo. It will presently be found that his Lordship experienced other difficulties, in carrying his usurpation into effect.

In the case of the Dean of St. Asaph, his Lordship (unfortunately for his own fame, and the cause he supported) undertakes to give his reasons for his opinion. These, as well as the facts which he there relates, deserve consideration. As it is on this case, the Chief Justice, who tried this cause, reposed himself, I hope the Court will indulge me in a particular examination of its doctrines.

First. It is stated by Lord Mansfield, that he knows of no case where a different direction has ever been given to a Jury. This is an unguarded declaration, and his Lordship shall be convicted out of his own mouth, and by the testimony of two credible witnesses, equally learned and noble with himself; not only of a most singular *want of recollection*, (to use no harsher epithet) but also of the most *glaring inconsistency*.

In the case of Rex v. Horne, 11th, State Trials.—Lord Mansfield in charging the Jury says, "I told them (meaning the Jury who tried Woodfall) "what I now tell you, and what I believe never was doubted, and what "was not questioned on that occasion, (though I desired they might move "the Court upon it if they had any doubt) that it is not necessary to prove "an *actual intent*, which is the private operation of a man's mind; but a "*Jury were to exercise* THEIR judgment from the *nature of the act, as to the* "*intent* with which it is done." A clearer recognition of the right of the Jury, could not be expressed.—But his Lordship, again, on the motion for a new trial in the above cause of Rex. v. Horne, Cowper, page 672, really *forgot* when he first reported the evidence, a very important part of the testimony, which he permitted to be read to the *Jury*, to *explain* the *intent*. Thus much as to the testimony he bears against himself.

In the debates in the House of Lords, in England, on Mr. Fox's declaratory act, which will be hereafter more particularly noticed, Lord Cambden, (than whom a greater lawyer, a better man, and a sounder patriot Great Britain never had; the arrogant pretensions of Lord Mansfield to the contrary notwithstanding) and Lord Loughborough both declare, that whenever they have presided on trials for libels they have uniformly left the whole matter to the Jury, under the direction of the Court. They expressly declare that they never required a Jury to find the defendant guilty on the mere proof of publication, and of the truth of the innuendoes. Both these lords were cotemporary with, and presided at many trials under the very

ers of Lord Mansfield, and how far he can be supposed to be ignorant of *their charges* to Juries, is left to be decided by those who hear the facts.

In the same case Lord Mansfield says, a general verdict of "guilty," is equivalent to a special verdict in other cases; and this he says is peculiar to the form of a prosecution for a libel. How this becomes peculiar to the case of a libel is however not shewn; *nor is it true.* The same law governs in all criminal cases; and this is, but the cunning device of a despotic judge, to rob the Jury of their power to find a general verdict. The Court never had a right to make that verdict *special*, which the Jury declared to be *general.* And the rule attempted to be established by Lord Mansfield, is directly contrary to the uniform practice in all other cases; it is an artful mode of stealing from a jury a special verdict, for improper purposes, unknown in the law, and repugnant to the genius of our jurisprudence.—It ought never to be viewed, but with indignation and abhorrence.

It is the intent, which makes any act criminal or innocent; the mere writing and publishing a paper is in itself innocent. The *tendency* of the paper, and the *intent*, with which it is written or published, may make it criminal.

Killing another, is murder, or man-slaughter, or justifiable according to the attending circumstances.

Taking another's property is tortious or justifiable in the same manner.

Putting another's name to a writing to secure and discharge the payment of money is forgery, or not, in the same manner.

Writing or publishing certain papers is *treasonable*, libellous, or innocent in the same manner.

In the case of the Dean of St. Asaph, Lord Mansfield, speaking of the *intent*, says:...." A criminal intent from doing a thing *in itself criminal*, with-" out a lawful excuse, is an inference of law. Where an innocent act is made " criminal, when done with a criminal intent, the *intent* is the material *fact* " to constitute the crime.". ..It will be seen that the intent is here called a fact. The *intent* is equally the legal inference from the facts, whether the thing done be *criminal in itself*, (for which there never *can* be a *lawful* excuse) or whether it be made so by the particular intent. And it can be demonstrated that however criminal in itself an act may be, if the Jury do not *find* the *intent*, the Court cannot give judgment against the offender.

Stealing is an act in itself unlawful; but suppose on a trial for stealing a horse, a Jury should find these facts.—That the offender had borrowed a horse to go to a certain place, that he went there, and afterwards went off with the horse, secretly and clandestinely; the Court could not give judgment on such a verdict. This shews that the Jury must find the intent before there can be a conviction—but cases solemnly decided are not wanting to shew that the law is as we contend—the Queen vs. Fuller, State Trials, 573. This principle has also been well reasoned on, by Loft in his Law of Evidence, page 847...." In a free government, transactions which concern " the public are, and ought to be matters of public notoriety.. Animadver-" sions on them, if not thrown wantonly, and at random must correspond " with known facts, and with clear principles of the Constitution. The Ju-" ry has a right to decide on the whole matter, but as we said before, of a " higher exercise of popular right, it may be here observed of this, that the " true and only proper defence on such an occasion, is not of a nature to call " for proof by witnesses. The time, the circumstances, the facts to which " the publication refers, the scope to which it is pointed, all speak for them-" selves; all under the general issue are properly before the Jury. The

" truth to be proved, where publications concerning government come in " question, is generally a moral truth; not whether the facts exist, (for if " these remain to be proved they ought not to have been asserted) but wheth- " er on facts of public notoriety, the principles and inferences are justly ap- " plied. Now this can never be a matter of testimony; but is directly and " absolutely to the knowledge and conscience of the Jury."

In first Leo. 287, 28th, Eliz. the following case is reported.—One was indicted in the County of Lincoln, upon the statute of West, 1 Cap. 34, and Rich. 2. Cap. 5. And the words were, "That Campion was not exe- " cuted for treason, but for religion, and that he was as honest a man as " Cranmer."—The bill was indorsed "Billa vera, but whether ista verba fu- " erunt *malitiose seditiose* or e contra *ignoramus*." The same indictment being removed into the King's Bench, the party for the causes aforesaid was discharged.

In the seven Bishops case, 4 State Trials, 386.—All the Judges, even those most devoted to the crown, left the *whole matter* to the Jury. One of the Judges (Halloway) says in his charge, "if you are satisfied there was an " ill intention, sedition, &c. you ought to find them guilty; if not, you are to " acquit them."

He then gives his opinion (as do all the others) on the petition presented to the King for which the Bishops were indicted, and adds, "but *it is left* to " you gentlemen."

In the case of Rex v. Horne, 11th State Trials, 288, Lord Mansfield gave a similar direction.

Several authorities may also be adduced to shew that where letters have been written to a father, relating the improper conduct of his children, they have been considered libellous, or not, according to the intent with which they were written, notwithstanding their contents might create great irritation, and tend to a breach of the peace. These authorities are not cited, because they must be familiar to every one acquainted with the doctrine of libels.

The time, the circumstances, the occasion which attend the publication of a piece, may operate to make it libellous or not. It will be found by the debates in the House of Lords, on the declaratory bill, which was introduced by Mr. Fox, that Lord Thurlow, who most strenuously opposed its passage, admits this; and in answer to an argument that even passages of scripture might be construed into libels, he says, that under certain circumstances, and on certain occasions, these passages might be something more than libels; thereby insinuating that they might be treasonable. To evince, more fully, the force of this argument, I will mention to the Court a case, which actually happened in England, upon the authority of one of the members of the House of Lords, who mentions it in his speech, and who says, he saw the record. At the time the pretender landed in Scotland, a man in London reported "that the King had got a cold;" every report at this time of this description, might be injurious to the royal cause. It was of infinite importance to the nation that the King should be in a situation to put himself at the head of his army, and to support the drooping spirits of his adherents. This man was prosecuted for his imprudence, convicted and punished. Surely in times of actual safety and tranquility, no Attorney General, however malignant, persecuting, vigilant or acute, would consider an expression of this kind criminal.

Having now shewn, as is confidently hoped, that the rule laid down by Lord Mansfield in the case of the Dean of St. Asaph is not the law, let us

for a moment advert to the oppression and inconveniences which would result from it, if it should unfortunately be established.

In Sal. 417. Rex vs. it is decreed that if the judge at Nisi Prius will admit the whole publication to be read, one part of it shall explain another, and the whole shall be taken together.

Lord Mansfield, in the Dean of St. Asaph's case, makes these, (for him most extraordinary) remarks—"If any part of the context qualify "what is set forth, it may be given in evidence, and every circumstance "which tends to explain the *meaning* is every day given in evidence, and the "*Jury* are the *judges* to find the *meaning*:" as if there could be a difference in legal constitution between the *meaning* and the *intent*.

The rule laid down by the Chief Justice, and in which he is fully supported by Lord Mansfield, is, that the Jury are to convict upon the proof of the publication, and of the truth of the inuendoes; and that the Court is to judge of the innocence or criminality of the matter *charged* as libellous, on *the return* of the record. How inconsistent is this with the rule, "that every "circumstance which tends to *prove* the *meaning* shall be left to the Jury." These circumstances never do, nor ever can appear upon the record. The defendant is thus deprived of the benefit of that very testimony, which he has been permitted to give, to shew his *meaning*. This, however, is but a small inconvenience compared with others which must flow from this practice.

The Attorney General spreads on the record only such *parts* of the supposed libellous publication as he thinks proper. He may take part of a sentence in one place, and connect it with part of another sentence in another place, and thus, from the most commendable and useful essay, cull the choicest materials for an indictment for a libel. In this way also, atheists may draw arguments in their favour from the holy scriptures: There is no God: is part of a verse to be found. This, unconnected with what precedes, would prove their tenets true. But if the infidel would cite the whole verse, he would find it thus, "The fool hath said in his heart—*there* is no God."—And it will presently be seen that in this very case, *undoubtedly* from the *purest* and *best* of motives, *part* only of the piece *read* in evidence is spread upon the record. Now the whole publication, as read to the Jury, may be as different from the mutilated parts upon the record, as part of the foregoing verse of scripture differs from the whole. It follows from this, that the same Court, which might decide the matter spread upon record to be libellous, would, could they be present at the trial where the whole publication is given in evidence, give a directly opposite opinion.

The conviction under the charge given in this case, is equivalent only, it is said, to a special verdict. The verdict of course is no evidence of the defendant's guilt. It does not even afford a presumption of guilt. He is then to employ counsel, and the privilege of being heard by counsel is not among the least important, to do what? to shew that he is innocent. He is consequently compelled to attend Court, term after term, to employ counsel, to find surety or be committed; and all this to convince the Court that he is not guilty of the crime wherewith he stands charged.* And it must not be forgotten that a defendant, by this mode of proceeding, is completely deprived of the use of any mitigating or exculpating circumstances which ap-

* It was here observed from the bench, that if these were hardships, they were of the defendant's own choosing, he had himself removed the cause, and sought a trial in the superior Court. He had made the case: he had taken every step complained of.

pear on the trial. And this is triumphantly said to be an advantage to the accused, because the judge at Nisi Prius *may* give a wrong opinion, and the privilege of having the opinion of the whole bench, and bringing a writ of error is more effectually secured.

This is not true.—The defendant has a right in all cases to move in arrest of judgment, and to bring his writ of error to the Court in the last resort; and this right is neither impaired nor increased by any new-fangled mode of trial, which a designing or tyrannical Court may attempt to establish. A defendant, when asking to be tried by his peers, is not to be told, "we cannot grant you this, but you may have a writ of error."

Whatever security we may *now* have against the abuse of this mode of proceeding, let it be remembered, the day may arrive when cruel, unprincipled judges, bound by no obligations which human laws can impose, when the spirit of faction shall have driven Justice from her judgment seat, may pervert the principle which is now contended for, to the worst of purposes. When the question will no longer be, is the accused guilty of any crime, according to the laws of the land; but, is he hostile or friendly to those from whom we received our offices, and during whose will and pleasure we hold them. When it may be necessary, in order to continue in power an arrogant, despotic, and relentless faction, to stifle the voice of complaint, to subdue the spirit which dares to oppose the progress of usurpation, oppression, and persecution. Such times have been, and may again be no one knows how soon. In these times, there can be security, only in that most invaluable privilege which a free people can enjoy, the right of a trial by an impartial Jury.

Let us trace the operation of this principle a little further.

If the act be criminal in itself, the inference of a criminal intent, according to Lord Mansfield, is to be drawn by the Court exclusively.

If the act be innocent in itself, and is made criminal by the particular intent, then he says the intent is the material *part* to constitute the crime.

Thus then, in some cases it is admitted, that the intent alone constitutes the criminality of the act, and this must in such cases be found by the Jury. But who is to judge whether the case under consideration is of this description or not?—The judge. Suppose then the judge should conspire with the Attorney General to destroy the liberty of the press, should pronounce every publication criminal in itself, would he not by this sort of management completely exclude the Jury from pronouncing upon the whole transaction, as explained by the context and other testimony given in justification? Does not this give a weak or wicked judge an unprecedented power in criminal prosecutions, by which, through ignorance or design, the right of a trial by jury may be wholly superseded?

Many other conclusive arguments occur in this view of the subject; but I have already doubtless exhausted the patience of the Court. I will therefore leave it to those who are to follow me, and briefly apply what has been said to the case now before the Court.

Let the Court compare that part of the supposed libel which the Attorney General has put upon the record, with that which, we complain, has been most improperly omitted.

On the record are these words, "Jefferson paid Callender for calling "Washington a traitor, a robber, and a perjurer; for calling Adams a hoary "headed incendiary, and for most grossly slandering the private characters of "men whom he well knew to be virtuous."

The whole piece as read to the Jury, is in these words, "*Holt says, the burthen of the federal song is, that Mr. Jefferson paid Callender for writing*

against the late administration. This is wholly false—The charge is expressly this: Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer; for calling Adams a hoary headed incendiary, and for most grossly slandering the private characters of men who he well knew were virtuous. *These charges, not a democratic editor has yet dared, or ever will dare to meet in open and manly discussion.*"

When the whole piece is considered, in connexion with the following facts, will any one say that on the face of this transaction there is a criminal intent?—First, It appears that charges of a similar nature had previously been made in other papers.

Second, That Holt most grossly misrepresented this charge.

Third, That the publication in question professes to be, and in fact is, a detection of the editor of the Bee, in misrepresenting a charge made, by the political opponants of Mr. Jefferson, against him.

Fourth, That this charge, at the time it was made, very much agitated the community, and became the subject of universal interest, and which, if true, would furnish such an unexampled instance of hypocrisy, and baseness in Mr. Jefferson, as would forever have disgraced him, and rendered him an object of horror and detestation.

Fifth, Under these circumstances, the attempt by the editor of the Bee, who professed to support the present administration, to divert public attention from the real accusation against Mr. Jefferson, was altogether improper and pernicious. To stimulate general inquiry, to force the friends of Mr. Jefferson to disprove the charge that had been publickly and universally made against him, if in their power, and which had, in the opinion of many, been very satisfactorily substantiated, to compel them to wipe away this foul stain which had been cast upon him, became equally proper and commendable. With this view the defendant explicitly defines the charge that *had* been made, not as one that originated with himself, but one which had previously been exhibited to the people. He makes no comments upon it, expresses no opinion as to its truth or falsity, but impartially demands, from a rival printer, an "open and manly discussion." How much would it have redounded to the honor and credit of Mr. Jefferson, to have vindicated himself against this charge, by meeting it with that fortitude and boldness which conscious innocence never fails to inspire. But alas! instead of this, a village printer, so remote from the spot where this transaction took place, as to render it impossible, or extremely difficult for him to procure the documents, and attendance of witnesses to prove the truth of what he published; in circumstances by no means adequate to sustain an attack made upon him, in the name of the people, by the first law officer in the state, upheld and backed by the party who placed Mr. Jefferson in the chair of government, is indicted for a libel; and that too, in a state where strong doubts are by many entertained, if the truth be a justification.

Ought not such a publication, attended with *such circumstances*, promulgated at *such* a time, upon *such* an occasion, to have been submitted to the Jury? Does it not sufficiently appear that this publication is not only innocent, but commendable? and that it is one of those cases, where, even according to the rigorous rule laid down by Lord Mansfield, the particular intent could alone afford an inferenee of criminality.

It is not difficult to account for the introduction of charges, like that given by the Chief Justice, into the Court of Great Britain. From the reformation, into part of the reign of King William, no books or pamphlets could be lawfully published, without previously obtaining a licence from cer-

tain public officers, which were different, according to the nature of the subject discussed. If any person transgressed this regulation, the only question was, whether the defendant was the publisher, and as to the truth of the inuendoes. The criminality did not, at this period, consist in publishing libellous matter, but in publishing without an imprimatur. The charge, given in this case, would at that time have been strictly proper. How easy was it for judges devoted to the administration, to introduce a similar practice on indictments for news-paper essays.

It is not extraordinary, that we see attempts made to deprive persons, indicted for libels, of a fair trial, by a Jury of the country. By looking at the dates of the cases that will be cited against us; it will be found that they were decided in times, when the people were violently struggling against the power and prerogative of the crown, or against a wicked and persecuting administration, pursuing a policy, hostile either to the interests, or liberties of the nation—the Court should therefore receive such authorities with great caution. It cannot have escaped observation, that whenever an administration resorts to prosecutions of this kind, under a law which punishes truth as severely as falsehood, that something is rotten, that something is attempted to be concealed which dreads the light.

But will not this Court regard as conclusive on this subject, the act passed in 1793 on this subject in England. By examining, it will be found that it possesses all the words appropriate to a declaratory act; and by adverting to the debates on it in parliament, both the friends, and foes of the law concurred in considering it as declaring, not as making, or altering the law. It will also be found that it received the sanction of the best men, and soundest patriots of that country; that all party feelings were forgotten in the discussion; and that it passed, after long and repeated debates, by the almost unanimous voice of the commons, and a very large majority of the lords. I humbly trust that this solemn protest of the nation, pronounced by the voice of its parliament, against the usurpation of the Judges, will be regarded as finally settling the question.

I have already too much fatigued the Court; the importance of the subject, and the distressing consequences that may result from what is conceived an under conviction of my client, must be my apology. I feel under the highest obligations to the Court for the patience with which I have been heard; and anticipate from this circumstance a decision favorable to the right of trial by Jury, and to the Liberty of the Press.

Mr. CAINES, On Behalf of the Prosecution.

If the impressive effect of this cause has been terror and dismay to the counsel by whom it has been opened; if to him, who is habituated to appear and to speak in this Court, such has been the result; I leave your Honors, and those by whom I am surrounded, to imagine what must be the agitation of one, who like myself, has been so little accustomed to speak here, that the very sound of his own voice is new to his ears, and from its novelty alone, creates alarm. In addition to this, I have to combat the force of conspicuous talents, but, however I admire the abilities already displayed, however highly I appreciate their worth, not one word has been urged which induces me to change the opinion I had originally formed, and behold this subject in any light, different from that in which I had viewed it in my closet. The derelection of many of the points made in the case, may perhaps embarrass my

argument, as, under the belief that they would be insisted on, I had in my mind arranged a train of reasoning, which was interwoven with all the objections taken, and in that order tended to prove, that the charge of the learned Judge who tried the cause was right, and that the admission of the affidavit to put off the trial would have been improper, because, the circumstances it contained could not be given in evidence, the law of the case of the Dean of St. Asaph, being the law of this state. In doing this, I may perhaps be occasionally led into refutations of even that which, by being abandoned, has been conceded; but if it be necessary to enforce my positions, I trust it will be excused.

Previous, however, to entering into the discussion, it may not be irrelevant, and I hope it will not be deemed disrespectful for *me* also to say some words on the importance of the cause.

Viewed in its utmost extent it is of a magnitude indeed. Where is the man who is not interested? Whence can they come who will not be concerned? It is not to those of the present and future times that the doctrine of this suit are confined; they embrace even those who are past and gone; they look on generations long since numbered with the dead; they protect the reputations of those who now moulder in their graves, and assure to the progeny yet to arise, the bright security of future fame. Yes, your honors, these are the benign views of the present suit; these are the blessings the indictment now before you is meant to procure. It is designed to ascertain to those now in life, the undisturbed possession of the honest character they may acquire, and that too, even when they are not here to guard it.

That this should be the scope, that this should be the end now contemplated, will I am aware be denied, that this should be the result, will to many now around me appear surprising. Familiarized with the present licentiousness of the press; what, they will say, is it not permitted to abuse men who have ceased to exist? can there be a libel on him who is no more? To these I should answer, the righteous spirit of legal justice guards the fame that has once been earned; it wills not that the living be wounded by attacks on the dead. Anxious for the peace of mankind, whenever that is threatened, it holds forth its arm to protect, punish, and repress. For this I do not cite to your Honor's any decisions, for the cases de libellis famosis, and Rex vs. Topham, must, as I stated the law, have arisen to your minds. They are not however now adduced as direct authorities, but for the sake of principles which influence the present question; which shew this to be the cause of good order, against strife and confusion; of reputation and character against slander and detraction; of all the mild and virtuous qualities against those of an opposite tendency. Because they demonstrate that he, who pleads for the people in this suit, pleads for doctrines to shield them from their greatest enemies; from those, who may cozen and cajole them with the specious words of liberty and freedom, but to rivet chains on their hands and strike daggers in their hearts; daggers of the worst and most dreadful sort, alike destructive to those by, and against whom they are used; dipped to the very haft in more than deadly poison; imbued in all the venom of malignant passions; a venom so fell, that it not only destroys the man, but with the very touch, festers and wrankles the very soul. These, your honors, are but a tithe of the matters which give consequence and importance to the questions in this cause; and, had the investigation rested on my abilities, did not books and precedents furnish the defence, and afford the refutation to the long list of objections that have been urged, I should scarcely, of myself, have under-

taken the task: but, as the law has laid down all that I have to advance, as I have only to turn to authorities to answer all that is alleged as reasons for arresting the judgment, or granting a new trial, I feel no embarrassment in the attempt. Lest, however, what I have said may be supposed to convey an imputation on the motives of those by whom I am opposed, I take this opportunity, and I rejoice that it is afforded, of making this public acknowledgment of the virtue, the merit, the integrity, and the abilities I see arranged on the other side. I am well convinced the purity of their intentions could never be doubted; that, though the principles for which they contend, might be replete with ten thousand ills, and capable of being used but to *one* good purpose, to that *one* purpose alone could they be applied. As to one of those gentlemen by whom I shall be answered, so devoid of all that is bad, do I think his soul, that if ever the fancy of the antient philosopher could be realized, and a mortal here be found, who could walk the busy rounds of life, with a window in his breast, that,* I would say, is the man. I cannot but regret that it is against them, and against him, that I have to argue. Had it been otherwise, had our places but have been changed, then would your Honors have been convinced of the rectitude of our positions; then would you have beheld the triumph of law and of truth, and I myself have gloried in my defeat. As however, it is otherwise decreed, I shall, as well as I can, under the influence of emotions, which though calmed, will not subside, consider the points, and the arguments advanced in their support.

Inverting the order which has been pursued on the part of the defendant, I shall examine what has been urged on the second objection. That is, "That the piece alleged to be libellous, and which was read in evidence from "number seven of the Wasp, is materially and substantially different from "that charged in the indictment, and the piece so read is not libellous."

To this I shall beg leave to observe, what will not I presume be denied, that utile per inutile non vitiatur. It is not necessary to set forth the whole of a publication out of which a libellous part is taken.

No more need be charged in an indictment than is necessary to constitute the offence. We find this not only a general maxim, but expressly laid down in cases of libel.

In Rex vs. Horne, Lord Mansfield says, "what is necessary to con-"stitute the charge must be set out, and all beyond, is surplusage. If a "crime is a crime, independent of the circumstances, they only aggravate, "and do not constitute the offence. If the circumstances stated, do of "themselves constitute the offence, the rest would be immaterial and not "essential to the constitution of the crime."

So in the King vs. Bear, 2 Salk, 417, the Court ruled, "that it is not "necessary to set forth all the libel, if any thing qualifies that which is set "forth, it must be given in evidence."

The same principle dictates, that any other part of the libel which proves the charge, ought to be given in evidence and not set forth.—Gilb. L. Ev. by Loft, 852.

Had there been the slighest difference between the words used in the indictment and those read, though but of a letter, if it made a word of another signification, I admit the cases of the Queen vs. Drake, 2 Salk. 660, Rex vs. Beech Cowp. 229, the King vs. Beere, 12 Mod. 219, would then have warranted the objection; but surely it is unnecessary to employ time on that which must be self evident.

It is said, however, this was not a libel of the defendant's; he only reite-

* Pointing to General Hamilton.

stated what another had charged, and that it was a mere dispute between two rival printers, respecting the allegation against Mr. Jefferson. This is a flimsy excuse. It is settled law that the reputation, the character of a third person, his sex, or personal defects, shall not be made a subject of public discussion, under the pretext of a wager, or dispute between two others. In De Costa vs. Jones, Cowp. 729, which the Court must recollect was a case, on a wager respecting the sex of the Chevalier D'Eon, it was expressly ruled that it would not be endured, not only because it might be an injury to a third person, but for the same reason that makes a libel a crime, its tendency to disturb the peace of society. Every man thus brought forward, has a right to say, "how dare you bring my name in question? It is asserted, however, that this is a truth. To this I do not give any credit. Admitting it to be so. I trust to be able, ere I sit down to shew, that the defence set up is only an aggravation of the crime, and that the maxim of the greater the truth the greater the libel, is not only a legal, but a moral position. As I shall have occasion in the course of my argument to advert to the definition of a libel, it may now perhaps be best introduced.

A libel according to Lord Coke in 5 Rep. 125, is "scriptura infamatoria, against a private man, or against a magistrate, or public person. "If it be against a private man it deserves a severe punishment, for although "it be made against one, it excites all those of the same family, or kindred, "or society to revenge, and so tends, per consequens, to breach of the peace, "and may be the cause of shedding of blood and of great inconvenience. "If it be against a magistrate or other public person, it is a greater offence "for it concerns not only the breach of the peace, but also the scandal of government."

It is, says Hawkins, B. 1, Ch. 73, S. 1, "A malicious defamation expressed either in printing or writing, and tending to blacken the memory "of one who is dead, or the reputation of one who is alive, and to expose "him to public hatred, contempt, or ridicule." *

Will then the words answer this description? on this there can be no doubt, scepticism itself would be convinced, and hold a faith as firm, as that of the strictest believer.

We have however heard it urged, that Croswell himself made no charge; that he did not even add a comment, but, for the honour of Mr. Jefferson, merely invited to a manly discussion of that, which he repeated as the accusation of another. From this we are to infer, that even allowing the words charged to be libellous, Croswell was not the author.

To judge of the weight which ought to be allowed to this train of reasoning, which is, in effect, the substance of the first point raised by the defendant, "That the defendant ought to have been permitted to prove that he "was not the author of the alleged libellous piece, and that the same "had been handed to another person to be printed in his absence,"

It will be necessary to investigate what, in law, constitutes an author, what a publisher, and whether the circumstance relied on, or absence will furnish an excuse.

The word author, as applied to a libellous composition, is, in legal acceptation, to be understood in a much more enlarged sense, than when, in common parlance, we speak of the author of a book. For in law, any

* At a much later period we find C. J. De Grey, defining a libel "to consist in conveying and impressing injurious reflections on the minds of the subject."

man who gives publicity to a libel, by writing or printing it, is an author, as well as he that made it.

I am aware that in Lambe's case, 9 Rep. 59. b. it is said, "every "one who shall be convicted of a libel, ought to be either a contriver of "the libel, or a procurer of the contriving it, or a malicious publisher of it, "knowing it to be a libel."

But this case must not be taken without the exposition in Moor. 813; that he who writes shall be deemed the contriver, for he says in the first resolution, "that the contriver and also the writer are both contrivers."— This therefore explains Lord Coke's term of contriver, and your Honors will please to observe, that this qualification of the contriver, or author is not mine, but was made by Holt, C. J. in the King vs. Beere, and his Lordship, without this interpretation, denies Lambes' case to be law, 12 Mod. 219.

Adverting therefore to the superior authority, for the doctrines of this decision, to Moor, it is plain that the procurer of another to publish, and the publisher are both publishers, or authors.

The question then comes to this; "did the defendant procure the pub- "lishing."

To this I answer, in the fullness of legal emphasis, he did. He is the master, the principal who keeps the actual publisher, as his servant for the express purpose of publishing. There is not a more settled maxim of law, than, that the act of a servant, in the execution of the office in which he is employed, is the act of the master—Qui facit per alium, facit per se.

The Dictum of Buller, J. in Fenn vs. Harrison, 3 D and E, 37, corroborated by a thousand cases, is literally in point. His lordship says, "If the "master order a servant to go on a particular journey, and in the course of "it, the latter do an injury to some third person, according to the author- "ities, the master is liable."

Against this it may be urged, that his Lordship was speaking of a civil, not of a criminal liability; but it may be answered, the same distinction was taken and over-ruled, in Rex vs. Topham, 4 D and E, 127. It was there triumphantly asked, "whether a master was to be answerable for the criminal "acts of an infant," &c. To this Lord Kenyon replied, the case was not of that sort; and the whole Court determined the defendant to be the publisher, or author, (for they are synonimous) though the libel was, like this, contained in a news-paper sold by his servant, and, for what appears, might have been the charge of some other person.

It is true in Rex. vs. Almon, 5 Burr. 2686, it was said, "That the "*mere buying* in the shop of the defendant, was not *conclusive* evidence "against him, though his name appeared in the pamphlet." But let it be observed in that case, no proof was given of the work's being *printed* in the shop of the defendant. On the contrary, affidavits were before the Court to shew that it was not. But here the circumstance of printing in Croswells shop, is acknowledged in the objection itself.

This reduces it to the plain, simple question I have before asked, "Whe- "ther the master is answerable for the acts of his servant, done in the way "of his trade."

Was it otherwise, how easy would it be, to escape punishment. A miserable journeyman might be employed to perform the mechanical operation of printing, and his deed of darkness done, be removed beyond the fear of punishment.

It is therefore, righteously determined, that the printing a news-paper is primâ facie evidence of publication, unless it be shewn that it was sup-

pressed, Baldwin vs. Elphinston, 2 Black. Rep. 1038. That this can be made to appear, is not asserted. Nothing like repentance is pretended.

Whether even the suppression would be efficacious, may well be doubted: for, it is but in a dictum that it is acknowledged, and we find in Almon's case, 5 Burr. 2686. That though the defendant did, on being acquainted with the contents of the libel, instantly return all the pamphlets, still it did not avail.

But, on this point, we are not left to vague conjecture; it has been solemnly determined in Rex vs. Williams, 14 G. 3. "That if a news-paper "be printed and published before the proprietor rises, and so soon as he is "up he stops the sale, it shall not be sufficient to acquit, though after ver-"dict it is proper in mitigation of damages." Gilb. L. Ev. by Loft, 844.

It may, however, against this be contended, that printing ought to be no more than primâ facie evidence of contriving. From this, and the tendency of the arguments in defence already used, an analogy may be attempted between cases of libel, and those of uttering actionable words; in which last, if you give up the first speaker, and afford an action over, you avoid the effect of the suit.

But the various natures of the different proceedings evince the inapplicability of the reasoning. In an action for words, compensation for damage is all that is sought, and the law never allows of more than one compensation, which ought of course to come from him who first offended. — In criminal suits, each person is equally an offender; for, being founded on torts, each is a principal,—and punishment, not recompense, is the object of the measure

On this principle, therefore, it is laid down in Want's Case, Moor. 627, "That those who *disperse* libels, though they know not the effect of them, "nor ever heard them read, are punishable."

This can be *only* because they are considered as publishers.

It follows, that not only he who did not write or contrive a libel may be a publisher, but he who is ignorant of its contents.

So, "taking the copy of a libel is making a libel." Rex vs. Beere, 12 Mod. 220.

In the Queen vs. Tutchin, 5 St. Tr. 535, Holt, C. J. says, "every "copy of a libel is a libel, every printer of a libel is guilty of a libel."

Every letter of what his lordship said was acknowledged by Montague, counsel for the defendant.

Nay, the cases have gone so far, that should the libel not have been actually printed, but only copied and collected with an intent to print, the crime is equally great, for it is ruled, "the offence is in taking the copy, "because it multiplies the means of scandal, and therefore possession of "the libellous piece, is evidence of being the author or publisher." Rex vs. Beere, 12 Mod. 220. Carth. 409.

It is not here alone that the same doctrine is established, for in Rex vs. Paine, 5 Mod. 559, it was ruled, that bring an amanuensis, in a case of libel, bring the mere writer of what the author dictated, was to be equally criminal. Nay, added Lord Holt, "Though it be burnt immedi-"ately afterwards, he is still the author." Ibid. 163.

On the same point, 2 Hawkin's, B. 1. C. 73. S. 10. is equally explicit.

"The copying a libel shall be a *conclusive* proof of publication, unless "the party can prove that he delivered it to a magistrate to examine into;" in which case he adds, "the act subsequent is said to explain the intention "precedent."

Your Honors will please to observe, that in speaking of the explanation of that which might exculpate, his expressions are, as if he doubted, "it is *said*;" not that it *is* so; but in describing the offence, that which constitutes the crime, he is positive: "Copying a libel *shall be a conclusive* proof of "publication;" and so it must be, for it is an act which repeats the crime; and a crime is not the less so, because it has been antecedently committed. Who ever heard of a criminal justifying himself by the act of another criminal? When, or in what code was it allowed as a proof of innocence to say, another has been guilty before?

There is not a case of latter times, which does not recognize the positions we insist on.

In Rex vs. Kinnersly, Black. Rep. 290, in shewing cause against a rule for a criminal information for publishing a libel, it was proved that the paragraph in question was taken from another paper, against the printers of which, informations had been granted, and that the defendant had *voluntarily* published a recantation; yet it was held no reason for denying the rule.

Every one of these doctrines were confirmed in Rex vs. Holt, 5 D. and E. 436, where it was ruled, that printing what *had* been printed, is printing a libel, if the matter be libellous, and that the circumstance of reprinting is no justification.

Of what avail then would it be to shew that the defendant was not the original writer or publisher. That he printed to stimulate to an inquiry into the truth, unless his intent, as has been slightly urged, is an exculpation. To this point I shall hereafter speak; at present it may, I presume, be said to be established, that the defendant is the author, though he did not write it: that the act of his servant is his act; and that the servant's printing and selling, is a printing, publishing, and selling by the defendant, so as to make him, in point of law, fully the author.

I have still to examine whether this, being done in his absence, will vary the case.

On this point I shall again refer to the case of Rex vs. Williams, Gilb. L. Ev. Loft, 844; the defendant was, to all intents and purposes, absent. He was in bed; the printing and publishing was before he was up, and he even stopt the subsequent sale: yet this did not prevent his liability on account of the act of his servant.

So in the King vs. Elizabeth Nutt, Fitzgibbons, 47, the pamphlet on which she was indicted was bought of her servant in her absence; she knew not the contents, nor of its coming in or going out; Lord Raymond said, "The defendant is guilty of pulishing this libel, the shop being kept under "her authority and direction, and it would be of very dangerous conse-"quence if the law was otherwise; and it has been so ruled in a great many "instances."

A still stronger case is that of Salmon, Hil. T. 1717, Gil. L. Ev. Loft, 844: there the defendant kept a shop in his father's house: during his absence a pamphlet was asked for, which the father desired his neice to look out, and it was determined a publishing by the son. It does not appear that the neice was even the servant of the defendant: the sale being made in the course of his taade, and on his account, was held to fix the guilt on him.

There is a species of absence which I am aware is held to be primâ facie, exculpatory evidence. That is, when absence is occasioned by the

imprisonment of the master. But even then, if access of servants be proved, together with the liberty of transmitting copies, proof-sheets, &c. the exculpation ceases. Rex vs. Woodfall, Gib. L. Ev. by Loft, 844.

I am ready to acknowledge that in the note in 2 Hawkins, 131, this last case is cited as affording an absolute excuse; but your Honors will please to observe, that the note is not by Hawkins himself, and if we examine the other cases on this point we shall be convinced, that the manner in which it is stated in Loft is more consonant to law, and the strict principles of justice.

It will appear therefore, I trust, to have been fully demonstrated, from the evidence given and the authorities adduced, that the defendant's servant having sold the paper containing the libel, on which the present indictment is founded, in the shop of the defendant, and in the usual course of his trade, renders the defendant the author of it, though it was originally written by another person, and repeated for the purpose of "manly discussion." That also the absence of the defendant does not alter the case.

Having thus removed this objection, I shall only on this point add, that as none of the circumstances relied on, amount to an excuse, they could not have been given in evidence, because only those things which are lawful excuses are admissible on the trial: per Mansfield, in Rex vs. Dean of St. Asaph, 3 D and E. 428; and that even if given in evidence, the Jury could not have judged of them, because they are matters of law, and must have been left to the Court.

In the case made, the defendant, Fifthly, insists "that the permission "given to the Attorney General, to read to the Jury certain passages from "numbers of the Wasp, other than No. 7, was improper." Though this has not been strenuously supported, I shall, lest it may hereafter be resorted to, say a few words to evince how truly weak and futile the objection is.

It is a general and universal practice, that whatever goes to establish the charge may be given in evidence. Every thing that tends to support the indictment, and shew the intent, the quo animo, and to explain the allegation may be adduced in testimony.

In Rex vs. Mathews, 9 St. Tr. 694, another sentence was read in evidence: it was objected to by Hungerford for the defendant; but said the Attorney General, "I do not mention it as being set forth in the in-"dictment, but surely I may make use of another part of the libel, to ex-"plain this:" and not only was this done, but other and separate sheets found on the defendant and in his chamber were handed to the Jury. On this account no exception was taken, though a motion in arrest of judgment was made.

In Rex vs. Francklin, 9 St. Tr. 259, the King's Speech, journals of the House of Lords, and letters from the Secretary of State were made use of to support the allegation in the indictment, shew the nature of the libel to be such as was set forth, and to explain its meaning.

On the same principle, in Rex vs. Horne, Cowp. 675, the affidavit of Capt. Gould was read to prove the applicability of the libel, to the subject matter. Lord Mansfield's words, in 11 St. Tr. 290. are, "it is very "clear he was a proper witness, because it was extremely material to shew "what the subject matter was to which the libel related."

If therefore the affidavit of a third person was read to shew to what the libel of the defendant related, and explain it, certainly subsequent

numbers of the same work, by the same defendant, were good evidence, and rightly admitted.

Here I beg leave to correct the learned counsel by whom I have been preceded, as to the object for which the affidavit of Capt. Gould was read. It was not to shew the *intent* with which the libel was published, but to substantiate that, to which it applied.

In the very last term, in Freer's case, Mr. Hamilton maintained the principles for which we contend: his words, (for I took them down) were, "I have heard that truth may not be given in evidence on a libel, but never "did I hear that another paper might not, to prove the intent."

Every circumstance which tends to shew the crime, and take away all possibility of exculpation, may be brought forward on the trial, in the same manner as the defendant may avail himself of whatever will exeuse.

In the King vs. Holt, 5 D. and E. 436, it was permitted to be given in evidence, that the defendant's servant sold the libellous papers with a cap on his head, on which the words "liberty and equality" were inscribed.

Nay, even after conviction, extraneous matter may be shewn, by way of aggravating the offence. Therefore in Rex vs. Withers, 3 D. and E. 428, a second libel was read in order to increase the punishment. Surely then, and a fortiori, on the trial another number of the same paper, may be adduced to prove the intent, and malicious design of that which is charged: for I contend, that every number of a work, continued in numbers, is part of one and the same work; that they all constitute a whole, of which each part may be given in evidence of the other.

I feel it impossible your Honors, to add any thing more on this subject: not that what I contend for is not to be maintained, but that it is so plain and self-evident, that to attempt to elucidate, would be to obscure; and that I do not bring forward authorities expressly in point, is because it is so indisputable that it has never yet been questioned. It is like the position that a grant to a man and his heirs, conveys a fee, to which effect, not a decision is to be found, because, as Lord Hale observed, no man has ventured to assert the reverse.

Having thus, I trust, disposed of those objections which have been noticed, I shall now advert to that made against the learned and accurate charge of the Judge before whom the cause was tried. For a variety of reasons his Honor is said to have misdirected.

First. Because he charged that "particularly in cases of libel the Jury "are not the juges of law and fact."

Against the propriety of this position never did I hear a decision. There is not I believe any maxim of law more universally assented to, than on questions of fact the Jurors determine, on questions of law the Judges.

That there are cases in which the law and facts are so blended and interwoven, that to pronounce on the one, is to decide on the other, cannot be denied; and that whenever the fact constitutes the crime they ought so to do, is allowed.

That a Jury may bring in a general verdict of not guilty does not negative, but affirm the doctrine, contained in his Honors charge. For the supposition of the law then is that they acquitted the defendant of those facts, on which, had he been found guilty, the law would have pronounced. This is the reason why a verdict of acquittal cannot be set aside by the Court, for that would be to assume the office of Jurors, and decide on the fact. The declarations of Lords Camden and Loughborough, cannot weigh against decided cases, and the very *one*, of the Dean of St. Asaph is against

them. The finding in Woodfall's case, of "guilty *only*," &c. does not contravene our arguments, for the word "only," made the verdict pregnant with something else, contrary to the principle that all verdicts must be clear.

To controvert that the matter of law, the legal inference from facts, rests solely with the Court, is astonishing, when every day's practice establishes it to be true. Does not the Court day after day grant new trials when the Jury attempt to decide contrary to the rules and dictates of law? Has not this Court declared, that they will set aside their verdicts ad infinitum, when they thus presume? And what is it but the height of presumption in men ignorant of the law, or any other science, to venture on expounding what they do not understand. I have heard in this æra of new fangled doctrines, that men were born legislators, but never yet have I heard it hinted, that they were born lawyers.

Was the law to receive its construction from Jury exposition, what a chaos would our books of reports present? It is only by giving to the Court exclusively, the right to determine on points of law, that the stream of Justice is made to flow in one regular and even channel.

What reason can be assigned to take the doctrine of libels out of the general and cautious maxim of our jurisprudence? Let the gentlemen who argue for doing so, beware, how they introduce a power above the law; how they allow what shall be, and shall *not* be a crime, to be at the uncertain will of every Jury who might be empannelled.

We all know the detestation with which the genius of our jusisprudence beheld any attempts by Juries to appropriate to themselves the right of judging on legal points. All the severities of an attaint awaited them. And though in criminal matters, this is in Bushell's case said to be otherwise, yet the doctrine may be questioned.—See 1 Roll. Alr. 281, L. 5.

I really feel at a loss to argue in support of what is so manifest, and pervading every page of our books. I cannot more fully enforce what I have said, than in the words of Lord Raymond in Rex vs. Francklin, 9 State Trials, 275, on a case of the same sort: "This" says his Lordship "does "not belong to the office of a Jury, but to the office of the Court, because "it is a matter of law, and not of fact, and of which the Court are the only "proper judges. For we are not to invade one another's provinces as is "now of late a *notion among some people who ought to know better* for "matters of law and matters of fact are not to be confounded."

Taking now the same liberty with the objection to the judges charge, which I took with the arguments of the opening counsel, I shall advert to the fifth, because it seems to me that on the solution of *this* the second and fourth depend. For if the Court alone are to decide on libel or not, it follows of course that they must have power to set aside a general verdict of guilty, if the piece be not libellous; and if they are to determine the criminality of the act, the intent of that act must be matter of law, and consequently resting with them.

Taking therefore this order, and reserving for an instant the consideration of, whether "the law in the Dean of St. Asaph's case be the law of "this state:" I shall speak to the objection which was taken to his Honor's charging that,

"Whether the piece was libellous or not was not to be decided by "the Jury;" or in other words whether libel or not, is exclusively matter of law.

If the reason why a libellous piece is indictable, be adverted to, it will appear that it must necessarily be a matter of law.

A libel is punishable criminally, not, as has been urged, on account of the *intent* of the party, for that is no ingredient of the crime, but because it is a breach of the peace, or has a tendency to a breach. Now is not that which constitutes a breach of the peace a matter of law? and must not the Court necessarily decide on that which has a tendency to the breach of that matter of law? Will any man who has read a page from any one book of legal authority, contend that a Jury can decide on what in law constitutes a battery, and what an assault? or any other breach of the peace, or what has a tendency to it? If not, surely it must be acceded, that, as libel or not, is a question of tendency to a breach of the peace, and a breach of the peace is a matter of law, whether a publication be a libel or not, must also be a matter of pure law. Wherever there is cognizance of the principal, the incident follows of course.

These are not the reasonings of modern days; long before the Dean of St. Asaph's case, in the King vs Tutchin, 5 State Trials, 532, both Weld and the Attorney General in opening the prosecution say, "the matter "we are to prove is, that he was the person who wrote and composed these "papers, and did publish them or caused them to be done."

"Gentlemen of the Jury," says the Attorney General, "the matter "you are to enquire into is, whether the defendant be the author or pub-"lisher of these libels; that is the matter you are to try.

Not whether the piece was a libel or not. Of *this* not a word.

It may however be replied that these were the dicta of counsel for the crown; but let it be remembered that they are dicta acknowledged by the counsel for the defendant. That Montague his advocate, in page 539, when addressing the Court, observes: "We must be in your Lordshiph's judg-"ment whether the papers make out that assertion to be just, as it is "said."

To evince how fully libel or not is for the Court to decide, a stronger circumstance cannot be adduced, than the determination of the Court in the same cause, or the competency of Mr. Pinfold to be a witness. He had read the libel and had formed his opinion on it, had even uttered his sentiments, that it was libellous, yet it was no ground for challenge, because the point for the Jury's determination was not that of libel or not; but the facts of composing and publishing.

This principle so asserted on one side, and acknowledged on the other, confirmed also by the allowed competency of Mr. Pinfold, is strongly enforced by the learned Judge who tried the cause.

"Gentlemen," says Holt, Chief Justice "I must leave it to you, if you "are satisfied that he is guilty of composing and publishing these papers at "London, you are to find him guilty."

So in Owen's case, 10 State Trials, Append. 208, the words of Lord Chief Justice Lee, are: "I think the fact of publication proved, and if so, "you cannot avoid bringing in the defendant guilty."

Again, in the King vs. Franklin, 9 State Trials 275, by that upright Judge whose words I have once already quoted, by Lord Raymond, the law is thus laid down to the Jury.

"In this information or libel there are three things to be considered, "whereof two be for you the Jury, and one for the Court. The first thing "under your consideration is whether Mr. Francklin is guilty of the publi-"cation of the Craftsman or not. The second is, whether the expressions

" of that letter refer to his present majesty and his principal ministers of state, " and are applicable to them or not. This is the chief thing in the infor- " mation, for if you think that these defamatory expressions are not appli- " cable to them, then the defendant is not guilty of what is charged upon " him; but if you think that they are applicable to them, then the defen- " dant is guilty thereof, on this supposition, that you find him to be the pub- " lisher of that paper. These are the two matters of fact that come under " your consideration, and of which you are the proper judges: But then " there is a third thing, to wit, whether these defamatory expressions amount " to a libel or not. This does not belong to the office of the jury, but to the " office of the court."

In the King vs. Woodfall, 5 Burr. 2661, Lord Mansfield, following the steps of his predecessors, mentions that he told the Jury, as he had been obliged from indispensable duty to tell every Jury, on every trial of this sort, that " whether the paper meaning as alleged by the information was in " law a libel, was a question of law on the face of the record."

To enumerate all the cases where the same doctrine is contained, would be to recite every determination on libels, and fatigue your Honors with authorities without end. I shall therefore refer the Court generally to all the cases I have already cited, or may hereafter in the course of my argument adduce, remarking that these charges could never have originated for publishing without an imprimatur. The proceedings under that law could not have been for disseminating libels, but for violating the statute, for printing unauthorized by the imprimatur required.

If then the charge was correct in the antecedent points, it follows, " that in cases of libel, the Court can set aside a general verdict of guilty." Whether this be the only case in which the Court can do so, is not necessary to investigate; it is enough to prove that it can do so here, and for that I again cite Rex vs. Woodfall, 5 Burr, 2661, and the whole host of cases on this subject. But lest it should be said that this law is of modern times, I shall quote the words of Holt, Chief Justice, in Rex vs. Paine, Comb: 259, Holt 295, " If," says his Lordship, " he be guilty of making, writing, and " composing, then they find him guilty thereof, or so much thereof *as the* " *Court shall be of opinion he is guilty.*"

Was it otherwise, what a miserable state should we be in. The most innocent letter, might, by a Jury under the influence of party passions, be deemed a libel. What would be, and what would not be a libel, no man could tell. Every thing a Jury pleased to find, would make a man guilty. As Lord Mansfield justly observed, finding a man guilty on a libel, is, in fact, finding a special verdict, for he may afterwards move in arrest of judgment, and if the matter be not libellous, the Court will not pronounce judgment upon him.

In the King vs. Orme and Nutt, 1 Lord Raymond, 486, this very power was exercised, the Jury found the defendant guilty, and the Court arrested the judgment.

Does not the Court every day decide in actions of slander whether the words are actionable or not? and shall they not determine in an indictment for a libel, whether the words be libellous or not? Shall we be thus careful whether the pocket of a man be amerced contrary to law, and yet be careless whether his liberty be infringed, and his person confined? Shall we have a settled rule of law for the one and none for the other? Shall there be no controuling power, to bring within the confines of law a verdict which pronounces *him* to be a culprit who is innocent of crime? To sub-

scribe to these doctrines, is, to use the words of Lord Mansfield, without meaning the least disparagement to what may be advanced on the other side, an absurdity to which I trust neither your Honors nor myself will ever be compelled.

The next point to which I have to advert, is, that his Honor misdirected in stating,

"That the *intent* was simply a question of law, and therefore not to "be left to the Jury, but to be decided exclusively by the Court on the return "of the postea."

This will depend on another question.

Whether a libel be a lawful act or not? But before entering into this discussion, it will be necessary here to answer some of the arguments urged against it It has been supposed that but a part of a sentence might be spread on the record, and the mulitated sense thus turned into a libel. But as the charge must be supported by evidence, it would, by that very evidence be refuted. To conceive that a conviction would under such circumstances take place, is to imagine not only that a Jury would be forsworn, but that the officers of justice would be perjured, and betray their trust. This is an idea legal principles forbid us to entertain, it is an outrageous imagination, and rests upon such improbable infamy and wickedness, that it cannot be seriously thought ever to exist. If a libel be an unlawful act, it might have been well hoped, that a mere recurrence to some few known and settled principles, would have established the propriety of his Honor's direction.

It cannot, I believe be denied, that the rule of every system of jurisprudence is, you shall not do an unlawful act, and say you did not mean to offend. It is on this ground we have built the maxim, ignorance does not excuse the law.

"You shall not," say the twelve Judges, in their answer to this very point, "scatter arrows, deal in death and destruction, and say that 'twas in "sport."

Were a man to fire a loaded gun through the window of a house, and kill within it a person whom he did not see, it would be murder. It would he no justification to say he meant no harm. The answer would be, your firing the gun was an illegal act, and as to your meaning, the law interprets that. Were a man to knock me down, it would be no defence to say, that he did not mean to hurt me.

The reason is obvious: wherever an unlawful act is done, the law implies a criminal intent, but when the deed is innocent in itself, or may by possibility be so, and the intent with which it is done constitutes the crime, the intent becomes a matter of fact to be enquired into by a Jury.

The cases I have already cited are authorities for this, if any lawyer now in Court has read so little law as to want an authority for it.

It is singular, that in order to illustrate this, the very case of killing a fellow creature, used by our opponents, is the one I have selected. The mere taking away of life *may* be innocent; as, if it be self-defence: putting another to death is not then *of itself* a crime. But if done with a certain intent, with malice prepense, according to the term of law, then the intent makes, the otherwise perhaps justifiable act, a crime, and sends it as a fact for the Jury to ascertain.

The case put respecting the horse is of this very kind. The intent to rob, constitutes the crime; for the mere act of riding another man's horse is not criminal.

A thousand similar instances may be adduced; I shall not therefore

any longer labour at proving a distinction, which he who does not see, must be blind indeed.

The doctrine I have in this instance contended for, is laid down in Brewster's case, by Hyde, C. J. "the formal words of an indictment need "not, he says, be proved: the malice in murder, because the action sup- "poses it, unless the contrary appear." Keelynge, 24. St. Tr. 541. So the intent is matter of law, and if not done as alleged, ought to have been shewn in exculpation. And even now the defendant might do it in mitigation, if in his power: but let it be remembered that what he has urged is not disowning the intent, but justifying the act; or at least relying on that as an excuse which has been proved to be none.

But says the defendant, the judge gave to the jury no opinion on the nature of the publication. Of what avail to give an opinion on that which was not to be submitted to them. As a general verdict is, in these cases, adequate to a special one; as even cause for not only mitigating, but arresting the judgment, may, *after conviction*, be shewn, to give on opinion was a nullity; and I hope judges are not without the rule of ad vana lex neminem cogit.

The case of the seven bishops is much relied on, but that has been a subject of constant reprobation, and rested on the assumption of a dispensing power.

Allowing, however, all that I have said to be true, still if the first objection be well taken, at least a new trial must be had. For it states, "the "trial ought to have been put off, in order to give the defendant an oppor- "tunity to procure the testimony in the affidavit mentioned."

Whether this should, or should not have been done, will depend on another question, which is:

"Whether the testimony was admissible;" or, to give it in its fullest extent:

"Whether the truth could have been given in evidence'" because, (admitting all the libellous matter in the affidavit, and which it is hoped the Court will deem an aggravation of the offence, to be true) in order to put off a trial for want of testimony, it must be antecedently considered, whether that testimony can be received. If therefore it be shewn it could not, then the refusing to postpone the cause was right, and the objection must fall to the ground.

To investigate this point we must again refer to the definition of a libel. It has already been stated to be "any writing which tends to blacken "the reputation of another, and expose him to public hatred, contempt, or "scorn." And the reason why this is a crime, has also been explained to be, the tendency it has to break the peace, independent of intents or truth. The falsity therefore of the allegation is no part of the crime, because a truth may have the same effect, and having the same effect, is the same crime against which it is meant to guard. If then the falsity be not the offence, the truth cannot be the justification: for defences, like remedies, operate by contraries.

No problem, therefore, in Euclid is more mathematically clear than "that the greater the truth the greater the libel." For it, in a higher degree, induces those consequences against which the law designs to protect. Thus, according to my humble ideas, the question will stand.

But it rests not on so flimsy a support as what I may conceive to be right; it has all the sanction and authority of the old and venerable sages of the law.

"It is not material," says Lord Coke, 5 Rep. 125, b. "whether the "libel be true, or whether the party against whom it is made, be of good "or ill fame."

So in Lake vs. Hutton, Hob. 253. "a libel, though the contents be "true, is not to be justified." This authority, has in a manner somewhat novel, been cited for the *arguments* of counsel, and not for the *decision* it contains.

In Want's case, the first resolution is, "That a libel is punishable, "though the matter of the libel be true." Moor. 627.

"Nor, says Lord Raymond, in Rex vs. Francklin, 9 State Trials, 258. "is it material whether the matters or things published are true or false, "if the publication be detrimental to the government, or of a malicious, "injurious design."

I here beg leave to observe, that even truth itself may be maliciously related.

The same great and learned judge, in another part of the same trial, thus delivers his opinion on the point now in discussion: "As to your "saying you can prove what is charged on the defendant to be true, it is "my opinion, that it is not material whether the facts charged in a libel "be true or false." And a little lower down he adds, "a private man's "character is not to be scandalized, either directly or indirectly; because, "there are remedies appointed by law, in case he has injured any person, "without maliciously scandalizing him in his character, and much less is "a magistrate and minister of state, or other public person's character to "be stained, either directly or indirectly; because, the law hath appointed "another remedy, than publishing libels, if they have injured any person, "either in a public or private capacity."

I am aware, your Honors, that the opposite side may, as many others have done, cry out, this is Star-Chamber doctrine. But to these I shall answer, what your Honors know to be true, that the Star-Chamber was not detested from its decisions being contrary to law, but because it determined without the intervention of Juries and sometimes exparte.

In addition to this, the authority it exercised was fully discharged by the Court of King's-Bench. These therefore were the causes of its suppression, not the illegality of its adjudications. Comb. 36. 142. 5 Mod. 464.

Twyne's Case was a Star-Chamber adjudication, and so was that relating to the letter written to the boy's father. These determinations are, it is presumed, in this very court, good law.

In no one place can we find that the truth of an allegation renders it not a libel. Bracton says, Lib. 3. tracta de corona, c. 36, p. 155, "Fiat au- "tem injuria, cum quis pugno percussus fuerit, vulneratus sive fustibus "cæsus; verum etiam cum ei convitium dictum fuerit, vel de eo factum car- "men famosum."

Not a word of falsity as a necessary ingredient to make up the injury. With what appearance of reason then can it be said, that a libel should be false, as well as scandalous. I would refer those, who are so fond of this position, to the period in which the falsity of the allegation was taken into view.

At that time Lambard, in his Saxon laws, tells us, the tongue was cut out as the penalty of the lie. Was that to be the system of the present day, a speaking printer would be a marvellous sight; we should see the

host of scandalizing editors, mutum & tupe pecus; a foul and speechless race. Whether a part of this description is not even now applicaple to many of the number, I leave to the feelings of every man's own bosom. In making, however, this stricture, the Court, and all who hear me, will please to understand, I by no means intend to cast a general reflection on a useful, and in a free country, necessary calling; on the whole of a body of men, without whose labours the pillar of science could never have been raised, nor the Gothic temple of law, which we now inhabit, have been erected. I allude only to those who make the subscriptions drawn from the purses of others, the means of conveying private calumny and defamation; who, quitting the honest practice of an honorable trade, vend gall instead of ink: they are the men who form that band of libellers, whose offence is above-described.

Let it not be said that the mere *legal* definition of the term has been given; for that, in moral and common acceptation the truth of the assertion destroys the character of libel. For the interpretation insisted on, the authority of as great and as good a man as ever wrote can be cited. The name of a moral philosopher, who agrees exactly with the common law of the land, that neither truth, nor falsity characterize the crime.

"Malicious slander, says Archdeacon Paley, in his Moral Philosophy, "pages 237, 238, is the relating of *either truth* or falsehood, for the pur-"pose of creating misery. To infuse suspicions, to kindle or continue "disputes, to avert the favour and esteem of benefactors from their depend-"ants, to render some one, whom we dislike contemptible, or obnoxious in "the public opinion, are *all* offices of slander."

Thus we see that the truth of the assertion, both according to the rules of moral as well as common law, is totally immaterial. Nay, its being true is a reason given by the Court why it should be indicted, Rex vs. Bickerton, 1 Str. 498; Rex vs. Beharrel, ibid.

There is not any case in which the truth can be gone into on a prosecution, at common law, for a libel, but where it is founded on publishing as legal proceedings, circumstances, which are not true, Waterfield vs. Bishop of Chichester, 2 Mod. 118. the King vs. Lofield, 2 Barn. K. B. 128. The reason is obvious. Publishing the proceedings of Courts is a lawful act, and justifiable, though it may report what is scandalous. But when the publication is not such as the proceedings will warrant, then it is unlawful; for the law, in giving to the world its decisions, cannot be supposed to intend an injury, and still less to break that peace which the declarations of its judgments is meant to preserve. It wills not that its garb be assumed for purposes of wrong, and, like Cooke's case, Keelynge 24, permits not its immunites to be used, to violate its precepts. As to the King vs. Williams, 2 Show. 471. your Honors, and the Counsel opposed to me, know that it is not law, and has been denied by the whole Court of K. B. in the King vs. Wright, 8 D. and E. 296, 7.

I am aware that in actions for scandulum magnatum, the truth may be given in evidence, and that in the King vs. Fuller, 5 State Trials, 441. Holt, C. J. would, as the counsel for the defendant has said, have permitted the defendant to prove the truth of his allegations "*against Noblemen, "Peers, Officers, and Ministers of State.*" Let it be observed, however, that the information there was for scandulum magnatum, on the Statute,*

* This, during the argument, was denied by the defendant's counsel. The words of the indictment were, "discords between the said late King, and the Peers, and the

for spreading false news of great men, and in *that case, as falsehood is a necessary averment* in the information or libel, so it must be proved in evidence.

The doctrine of this case shews how immaterial the falsity of the allegation is, in establishing the crime of libel. For in Scandulum magnatum the truth must be proved, *only* because it is a *necessary* averment; but in an indictment for a libel, the word "false" is merely a *formal* expression, unnecessary, and therefore need not be proved. So in an indicment for murder, "not having the fear of God before his eyes, but being instigated by the devil," are inserted, but who ever heard of its being required to shew, by evidence, either that the defendant had not the fear of God before his eyes, or that he was instigated by the devil?

In the opinion of the twelve Judges, given to the House of Lords, on this very question, they said, that so far from its being necessary to prove the words false, the indictment would be equally good were it laid for publishing a certain scandalous and *true* libel.*

Let it not be urged that this opinion was given in 1793, and therefore not binding on us; for we see it is the necessary deduction from premises laid down as far back as the time of Bracton, acknowledged by all the authorities I have advanced, and by one not yet mentioned, the case of Peter Zengar, in 9 State Trials, which has all the advantages of being an American decision.

On the same principles, in a later decision, Rex vs. Burks, 7 D and E. 4. the whole Court of K. B. recognized this to be law. In that case they held an indictment to be good, without the word false.

It follows, therefore, that as the truth could not have been given in evidence, and the application was made to put off the trial, to adduce such, as if true could not have been received, the judge very properly refused to delay the cause.

But it has been urged that this doctrine is the result of a departure from the common law, evinced by the various statutes cited, all of which shew falsity necessary to constitute a libel, and in this respect are declaratory of our antient jurisprudence. To this the answer is short and obvious. These acts punished in a different manner from the common law; they were cumulative; giving new and additional, nay, more rigorous remedies; and therefore, when these were to be sought for, falsehood was made the basis of the right to apply. As to the affidavit negativing the truth of the libel being required on moving for an *information* against the publication, the learned counsel surely has forgotten, that informations are at the instance of the party himself, but indictments at the suit of the people.

In the first case, the Court says, if you are not innocent, you have no right to ask for an extraordinary interposition in your favor. The altar of Justice must be approached with clean hands; it is not to be endured that the guilty shall urge his own crime, as a reason for inflicting punishment on another. As to the case of John of Northampton, it has been so explained by other authorities as to shew it does not bear on the question.†

"Noblemen, and the great Officers, &c. to move, excite, and stir up" Vide ante, the Statute of Edward III on which the proceedings against Fuller, appear to have been founded. See also Gilb. Law Ev. by Loft, 848. S. P. and 2 Macnally, on Ev. 650.

* This was denied by the opposite side. The words of the answer of the Judges were then read by Mr. Caines, which proved his assertion.

† This was roundly denied by all the counsel for the defendant. Vide, however, the record in 3d Inst. 174. By this it appears that the punishment was because (on ac-

I have thus, your Honors, gone through all these formidable objections excepting one, which is, that his Honor erred in charging

"The law as laid down in the case of the Dean of St. Asaph, to be the "law of this State."

As that case is a compendium of all that I have said, if it be not the law of this State, then indeed the time I have taken up has been lost labour, and nothiug that I have advanced has been established.

Whether his Honor was right in that part of his charge, will turn on this point: Whether the common law of England is the law of the State of New-York? For if it be in force here, and the positions on which I have rested this case be taken upon it, and the law, as contained in the Dean of St. Asaph's case, be built on these positions, then is the law of that determination the law of this State.

To evince this, I have to take the constitution of the State in my hand.

When those who undertook the arduous task of framing it commenced their proceedings, they thought not of doing away all old principles, and establishing new. Such an idea could enter the head of only French revolutionary philosophists, (for philosophers they are not); creatures, who float on the surface of the sea of science, like those bubbles formed by raindrops on water, out of the same element indeed, but never incorporating with it. Not of this composition were those of whom I have to speak. They convened, as the constitution, in Vol. I. Rev. Laws, p. 2. informs us, for the purpose of "erecting and constituting a new form of government," not, your Honors, to create new principles; not to subvert the maxims of old institutions, but under their influence to establish a new *form.*

Had not such been their motives, instead of the sober words which appear at the head of our constitution, we should, in the spirit of rhapsody have been told, *Six thousand years have men wandered, in hoodwinked darkness, the dupes of priestcraft and kingcraft. At length the light of reason and of nature has illumined the earth. Liberty, with her sister Equality in her hand, has appeared and torn the bandage from our eyes.* No such farrago of nonsense disgraces our code. In that, the very first measure is to acknowledge the distinctions of the common law. It is resolved that "freeholders" shall meet to elect members for the purpose.

What is a freeholder but a creature of the common law? How is he known to us, but by the common law? where is he to be found, such as we do know him, but in that code, or the sources from whence it is drawn? Here then we see the very persons, who gave the power to frame the constitution, deriving their existence, and classing themselves under a species created by the English common law. The constitution rests on its being the work of the representatives of those who are designated in conformity to that law, and yet it has been made a doubt by some, though not by my opponents, whether the common law be binding on us, when its rights and qualifications are the basis of our constitution.

It is not merely in the reciting part of our constitution, that a reference to the common law is to be found.

count of the letter) Rex erga curiam et justitiarios suos hic in casu habere posset indignationem, quod esset in scandalum justic', et curiæ. Ideo, etc. See also this assigned as the cause, in Godbolt's Rep. 406. and also the reasonings on this case, in 9 State Trials, 20... It would seem too, from the manner in which this case is mentioned in Godbolt, before the third institute was written, that it was scandalum magnatum.

In the declaration of our independance, it is equally to be met with.

The abolishing "the free system of English laws," is one of the grievances which made us fly to arms against our king.

In addition to this, in the 35th Section of our own constitution, it is expressly laid down, "that such part of the common law of England, and "of the statute law of England and Great Britain, and of the acts of the "legislature of the colony of New-York, as, together, did form the law of "the said colony, on the 19th day of April, in the year of our Lord 1775, "shall be and continue the law of this state, subject to such alterations and "provisions as the legislature of this state shall from time to time make "concerning the same."

Where then is the statute, the act of the legislature that has annulled it, or ordered the truth to justify a libel?

In the last clause but one of the constitution, in the 41st Section, the last words are, "and further, that the legislature of this state shall at no "time hereafter, institute any new court or courts, but such as shall pro-"ceed according to the course of the common law."

Had Lord Coke himself wished for a recognition of his favourite code, a more explicit, and a more flattering one could not have been made. So upright are its principles in the eye of our constitution, that according to its dictates the whole tenor of justice is to be administered. No court can proceed but on its principles, except when altered by positive law. Where is the act that says the truth shall be given in evidence on a trial for libel? I have, long since proved that by the English common law, it shall not; and it is, in the words of the constitution, "according to the course of the com-"mon law," that your Honors are bound to proceed.

In thus adopting the wisdom of the British sages, we shew our own. It is the birth-right which we inherit from British ancestors, and in deriving our title from them, we bring it from the fairest portion of the globe.

There is however, it may be said, only a part of that common law, which they have handed down to us, that we have thought fit to retain. For, it is expressly declared in the 35th section of the Constitution, to which I have before adverted, "that all such parts of the said common law as may "be *construed to maintain*," certain tenets therein specified "or *are* repug-"nant to this Constitution, be, and they hereby are abrogated and rejected.

I find myself again reduced to the painful necessity of recurring to first principles, of which each objection is a continued violation.

The reason why the crime of libel is, by the English common law, considered as equally committed, whether the writing be true or false, has already been stated to be, the anxious desire of preserving the peace of society. That this should be repugnant to the Constitution of this, or any other government, except such where insurrection is the most sacred duty of men, is to me incomprehensible. But it is said that the genius of our Constitution is widely different from that of the English. That ours is a republic, and theirs a monarchy; and that it is *this* which creates the diversity. What is congenial therefore to theirs, may be repugnant to the spirit of ours. That with them, the King can do no wrong, and therefore to publish any thing against *him*, is contrary to the nature of their government; whereas with us, every officer is made amenable to justice, and may be punished; therefore, *this* being on the avowed acknowledgment of his liability to err, we have a right to expose his errors.

The whole of what is built on these positions, is like all the objections

in the case, founded on taking as facts, things which do dot exist, and denying those which do.

It is contended that all those parts of the common law which are repugnant to the *spirit* of our Constitution are abrogated: but that is not the case, the words "*are*" repugnant to this Constitution; what therefore is not *repugnant* to the letter of the Constitution is not rejected. That in this part the adherence to the letter is intended, will, I trust, appear on an examination of the different wordings made use of, in the first and last parts of the sentence. When particular tenets, such as supremacy, &c. are to be abrogated, then says the Constitution all such parts "as may be *construed* to "maintain" them; because the whole tenet being rejected, it was necessary to destroy the spirit, for which purpose the liberty of construction was indispensable. But when the body of the common law is to be affected by the Constitution, no disquisition is allowed in the spirit of the two systems. Those parts only which "*are* repugnant to this Constitution are to be abrogated and rejected."

Those who framed our Constitution knew too well the nature of men, to trust the common law to the speculations of visionary politicians, to make spiritual abrogations.

This alone, might perhaps, be enough to offer against all that is advanced on the supposed repugnancy of the common law doctrines, to the spirit of our constitution.

I shall, however, now proceed to the imagined distinction that has been taken; and, I may be allowed to say, that surely those, who argue for it, have but little weighed the principles of the British Constitution, or the force of their own words.

That the King can do no wrong, is a wise maxim, well calculated for the good order of society. The effect of his own responsibity is fully answered by the amenability of his officers, at the same time that the respectful decency with which all superior magistrates ought to be treated, is admirably preserved. But that it is not on non-responsibility that the doctrine depends, is evident; because a libel on a minister, who is liable to be called to an account, is punished in the same manner as if it was against the King himself.

Besides, to insist that if a man be responsible by law for his actions, he shall be liable to be libelled also, seems to me the height of injustice. Nemo bis puniri debet pro eodem delicto, is a rule so universal, that a doubt of it has never yet reached my ears, nor in the little study I have given to the laws of other countries, can I recollect one where it is denied.

According to this principle, if a man is to be pilloried; you may take the liberty of whipping him first. So little is this inculcated by our jurisprudence, that though a man were sentenced to be hanged, and ordered for execution, it would be murder in the sheriff to go into his cell and have him strangled.

Why is the law so? why is it thus laid down? Because says the Constitution, in section 13th, "no man shall be deprived of his right or privi- "ledges, but by the law of the land, and the judgment of his peers."

I trust that amongst these rights and priviledges, reputation is to be numbered. To omit it, would be to leave out that, for which alone the others are worth preserving.

But is is said, our right of suffrage depends on the liberty of freely investigating public characters. In other words, that the right of voting, involves the right of abusing. For it is contended, that as those whom we elect are to govern us, it is of the utmost consequence that we should know who we are about to appoint to the offices of public trust, and that we ought to be acquainted with the morals and characters of our delegates, neither of which can be effected without the power of pointing out their vices. As, however, the possession of all the moral virtues would not give a right to office, it is contrary to all reason to allow the censuring the want of a qualification, the being endowed with which, cannot be urged to substantiate a claim. It would be to authorise a refusal for a reason, where the proof of a right could not be enforced. These I presume are incontrovertible positions.

Notwithstanding however I thus adduce them, there is not, I trust, a man now in this Court, who more highly appreciates moral virtue than myself, or who sees in a stricter and closer union private virtue and public happiness. I am firmly convinced that the cement of our individual and general welfare is laid in moral virtue, and moral virtue, in revealed religion. Yet, your Honor's, if we look to the words of the Constitution of this State, if we advert to its principles both in its separate and federal relations, the private virtues of a public officer, are to the people of no kind of importance.

In well organized governments they are not required.

The line of duty of each man in place, is marked out. The circle in which he is to discharge every function is described, and *that* with a precision, which confines him within its limit, and allows not of any the slightest aberrations. His *public* station affords no degree of impunity to private misconduct. The garb of office cannot be converted into a shield to the man. No right to injure, no right to oppress, is from his station afforded him. If this be the case, then I say, whatever may be the man, we have so wisely and so plainly chalked out the path he is to tread, that his moral qualities can be detrimental only to himself.

Did we live under an arbitrary government; under a despot; whose will, when once chosen, was to be our law, then indeed his virtues would be of the utmost importance. It would then be our duty and care to search out him, who had the least of those many vices to which we are all prone, and the fewest of those foibles with which we all are tinctured: because it would be, for the hand of *him* to execute, whose head had planned, and whose heart had suggested the law. Thus circumstanced, to pry into his very soul, would be not only a right, but a duty.

That this nice discrimination, this accurate scrutiny into moral qualifications should be necessary in this country, where all religious ones are superseded, is, I confess, to me not easily reconciled. Let it not be said, would you then have a test act? No; but if there is to be a test, I would rather it should be in religion than in morals; because it is capable of being reduced to greater certainty. A man may be addicted to wine, to gaming, and to women; offer him as candidate, and one may say; "he drinks;" "poh," replies his neighbour, "where is the harm of a cheerful cup;" but adds another, "he games;" "well," says a second, "where is the sin of a "hand at cards;" "the fellow wenches," cries out a righteous voter; "give "him a girl or two," answers some indulgent hearer. But why should we require a test in morals, when we admit of none in religion. A man may be

a worshiper of God or of fire; he may be a Hindoo, a Manichean, or a Copt: he may believe in all the Gods of antient mythology, or the materialism of Spinosa, and neither by *our* Constitution, nor that of the United States, will one, or all of these circumstances affect his eligibility to any of the various offices in our system. Yet, if he fail in what any *printer* shall please to think a moral obligation; if he avail himself of any limitation, or other act against the opinion of any fellow, who has credit or friends to procure ink, types, and a press; he is, to the endangering that peace, the Constitution is so desirous to preserve, to be arraigned before a tribunal unknown to the law of the land. A self-erected jurisdiction, where the accuser, judge, jury, and executioner, may be united in one malignant wretch. Where accusations may be multiplied ad infinitum, and he found guilty on all, without even being heard. Where the whole proceedings are in private, and the first notice given to the unfortunate object, of this worst of inquisitions, is the publication of the sentence, and that, in quarters so various, that proofs of his innocence, and its reversal may never be known.

Is this freedom, this the boasted prerogative of a free country? I have ever been told its characteristic is, to be governed by laws of its own making, and magistrates of its own appointing.

It is become a maxim that misera est servitus ubi jus est aut vagum aut interum; and yet, according to this, contended for right, not only is the law to be uncertain, but the *Judge* also: not only *any*, but *every* man who has types in his hands, malice in his heart, and brass in his face, shall make, but fill the chair, and start into a censor morum.

For Heavens sake whence do they derive this right? where is their authority? where their commission? Is it from superior virtue? no. From superior knowledge? let every man read the codled productions of newspaper brains, and answer if this can be. No, but the Constitution has given them the right of voting, and this it seems is good for nothing without the priviledge of abusing every one they vote against. This is called the voice of freedom; yes, your Honors, of a freedom whose breath is pestilence, and whose words are death.

Did this claim, absurd as it is, originate in a love of virtue, it might in some degree be palliated. But if your Honor's will attend to the manner in which it is urged, you will perceive the foul source from whence it springs. It is acknowledged to be for the purpose of exposing the *vices* of their opponents. Not to put the *good* qualities of each candidate in the scale, and set the one fairly against the other. Not to direct the choice by a superiority of virtue, but by a deficiency of vice. If therefore this right of abuse is meant to enable us to choose the best, and most virtuous person, it is so managed as not to answer the end for which it is designed. For he who may be less vicious than another, may not have a single virtue to entitle him to be elected.

Ask of these very partizans of this detracting system, if they would consent to be themselves exposed to the shafts of public redicule, and they instantly answer no? we are private persons; but give us place and profit, and you may say what you please; backbite and defame to the utmost extent.

I leave your Honor's to judge of the pure sentiments these doctrines are likely to beget.

But on what principle of Justice is there to be one law for the reputation of the private man, and another, or none for that of the magistrate? Why is not the name of the latter as much entitled to protection as that of the for-

mer? Is it not a surprising doctrine to hear that a people, calling themselves wise and enlightened, should think the characters of their magistrates less worthy of the protection of the law, than that of an individual. I did indeed hear one of these reasoners, a calumniator by trade, say, that public men were fair game.

If these principles become the maxims of the land, they will force all men of modest merit to quit the walks of public life. The walks of *public* life do I say; if the doctrines contended for prevail, if judgment is to be arrested, or a new trial granted in the present instance, for any, or for *all* of the reasons urged, private life will be intolerable, for society itself will be dissolved.

In entering into civil communities, men agree to give up a portion of what is termed their natural liberty. They consent to cease to avenge by their own hands, and leave chastisement to the arm of the law. If thus the hand is restricted from punishing, is it to be supposed the tongue is to be let loose to provoke? Let it be recollected, that the spirit which lifts the one, moves the other. Abuse is only the substitute of force. It is the effort of him who dares not strike. When the laws have bound up the hands of a man, when he is unable to vent his rage, or gratify his malice by acts and deeds, he flies to words and reproach. The disposition which leads to one; is the same which prompts to the other. Calumny and slander, propagating injurious reports, whether true or false, keep alive the seeds of anger, provoke to violence, create that ferment, and excite those passions, which terminate in open violence, and acts of personal hostility.

It is to prevent these, that the mild and peaceful spirit of the common law punishes the spreading any injurious report, by writing or printing, and, as civil society is one of the ends of our nature, the common law, like *that*, has our peace and preservation for its object.

Allowing even that vice should be made known, that it should be held up to public view, still it ought to be in a way authorised by law. Every member of a regular government expects to be punished only as the law directs. It is one of the essentials of liberty that it should be so. For where law ends, tyranny begins. But if you take from man this right of being amenable to justice, *only* according to the course of settled law, if you leave him open to be punished by every one who pleases to bestow the lash, and refuse him redress afterwards, you so far send him back to a state of nature, and restore to him the right of avenging his own wrongs. A state of nature however, although a state of liberty, is not a state of licentiousness. Yet to reduce us to this last, is what is contended for in its fullest extent.

It is asked, however, are we not to know by whom we are governed. Yes, I answer, but to obtain this knowledge, calumny and abuse, slander and detraction, are by no means necessary. The highest offices are never those which are *first* held. Each candidate starts for public favour in those circles where he is well known. Where the press cannot add to the information already possessed; where, if any thing malicious is related, every hearer knows the credit with which it ought to be received. Here let him be canvassed, here where refutation, if it can be afforded, is at hand. That he *will* be so canvassed, the experience of every one must allow. After this, should he be elected, it ought in higher stations to be a certificate of those moral requisites so much insisted on, and so highly to be prized. After *this* to doubt his possessing them, is to libel those by whom he has been chosen. As to public measures, arraign them in the boldest language;

paint, in the most glowing colours, of the most fervent imagination, their baneful consequences, their deleterious tendency. Blame the act, but spare the man: add not after the censure bestowed, "and he that could have "suggested this, is an assassin."

I grant that the advocates for abuse, allow an action for damages. As if a man's reputation is to be compounded for pounds, shillings, and pence. The commutation for life has, in our refined times, been termed the result of Gothic barbarity: but reputation, without which life is a curse; for which alone we live; the fairest heritage a doating parent leaves a darling child; that jewel of the brightest water, is to be sullied, stained, and blackened,—and all to be compensated for in dollars, cents, and mills. Is public justice thus to be satisfied? Surely this is not according to the genius of our code, in which the civil injury induced by felony is not merged in the public offence. Whereas, the present doctrine maintains, that the private compensation extinguishes the public offence. That a libel, I mean a libel according to legal definition, in which the truth is not an exculpation, but an aggravation of the crime, should be considered as a public offence, is perhaps, peculiarly to be insisted on, in a republic, even allowing the necessity of filling our offices with characters of the most virtuous description. For, the best of these have their failings, their little foibles, and, as they are men, at times, their occasional sins. If each of these is to be dragged forth to public view, the instant they step forth in the public service; if their reputations are to be the preparatory sacrifice for public favour, if their names are to be offered up at the shrine of this Moloch, they will fly from the employ of those who annex to the offices they bestow so cruel a condition. For places on these terms you must find men without reproach, or men without shame. Of the former it is in vain to think. Those you will drive from the seats of power, from the seats of justice; you will place in their stead, none but the abandoned, the case-hardened, and the callous. Creatures without remorse; lost to all sense of feeling; careless of that public over whom they have to preside; equally despising and despised, they will use the sacred trust deposited in their hands, but as the means of wealth, bartering their own, and the nation's honour for gold; using what they thus acquire to secure the means of continuing their own power, or consigning you to others, more abandoned, more destitute of principle than themselves.

Those who argue against confirming the judgment, under a supposition that this power of libelling is necessary to the freedom of voting, will find that it will *thus* exist, only to be endangered. In a republic, it is not a spirit of liberty which we have to keep alive,—it is a spirit of faction that we have to repress: and this right, thus contended for, without benefiting the first, begets the second; the only enemy of our real liberty.

It creates the calumniator; that civil incendiary, who uses as firebrands, scandal, slander, and invective. With these he kindles the flame of party spirit. It is by means of these that the people are led from measures to men. The chief of every band, with a servile, hireling press at his beck, will vomit out slander on his opponents, and panegyric on himself. Every candidate, every voter will be equally the object of abuse. The good, the decent, the modest, and the quiet will be driven from your polls. The silent ballot of legal suffrage will no more be received. A headlong mob, with the bludgeon and the dagger for their qualifications, will give the rulers of the day; who, expelling and expelled, proscribing and proscribed, will mark their short-lived courses over this devoted land with fire and devastation, in blood and in flames, till the people, worn out with anarchy

and confusion, will, with joy behold some Atlantic Bonaparte arise, and the radiant glory of the American stars, that bright constellation of our western hemisphere, be seen to shine but around a tyrant's head.

These, your Honors, are not, would to God they were, the chimeras of lawless imagination; the feverish offspring of a heated brain. They are the inevitable consequences of a factious spirit, engendered and nurtured in news-paper calumnies, in the periodical slanders of the day.

Every word of what I have uttered stands recorded in the tablet of the times; imprinted, in letters so plain, that to them the sacred warning of holy writ, the mene tekel of Nebuchadnezzar was but a faint deliniation. To eyes that will but look, every iota of what I have said, is marked in characters as glaring, as if traced out by the hand of God himself with a sun-beam.

To prevent these deleterious results, these baneful terminations, the strong corrective of common law principles, of the law as laid down in the case of the Dean of St. Asaph, is the only remedy. If ever there was a time in which the application of it was imperiously demanded, it is the present.

Where is the man, either among those who are now serving, or have before served their country, that this daring banditti of news-paper calumniators has not ventured to attack? From Washington himself, to the lowest post-master in a paltry town, there is scarce to be found a character, that, by one side or the other, has not been traduced, according to the foul dictates of party spirit.

Let it not be supposed that this is confined to ourselves. No; not a nation on earth with whom we are connected is suffered to escape. We for ever read of the piracies of the British tyrant, of the Corsican usurper, and the diplomatic representative of each, and of all is equally vilified and bespattered.

I cannot, your Honors, better paint the importance of now enforcing the law, and confirming the present judgment, than in almost the very words of Lord Raymond on the same subject of libel.

"They are, says his Lordship, in Rex vs. Francklin, 9 State Trials, "arrived to that height, that they call loudly for your animadversion. It "is time to put a stop to them: for at the rate things are now carried on, "when all order and government is attempted to be trampled on, and re-"flections are cast on persons of all degrees, must not these things end in "sedition, if not timely prevented? Lenity you have seen will not avail. "It becomes then necessary to inquire after the offenders, that they may in "a due course of law be punished. If *you* do not interpose, consider whe-"ther the ill consequences which may arise from any disturbance of the "public peace, may not lie at your doors."

But we are told that these are nothing more than the natural excrescences of a free constitution. Do not, however, think they are the symptoms of health; no, your Honors, they are the convulsions of a high fever, of madness and delirium. They are the infallible prognostics of a dreadful distemper in the public body: of a corruption in the heart and center of social life, which will break out in civil discord and ruin; for as Lord Bacon observes, 1 Vol. 164. "The frequency of libels is a sure forerunner "and indication of tumults in a state." The reason is obvious, to set up the power of abuse, is to introduce a law without authority; to erect a tribunal against consent; and, contrary to principles, to introduce war, as the only the means of appeal for injuries without redress.

I need not remind your Honors, that the policy of all governments is against libels.

By the civil law, Cod. b. 9. Tit. 36, de fam. lib. those who accidentally meeting with a libel disperse it, are sentenced to be capitally punished, because, says the code, they should have burnt or torn it. For, as it is said by the Court, in Enter vs. Carrington, 2 Wils. 292. "All governments "must set their faces against libels, and wherever they come before the "Court and a Jury, *they* will set their faces against them; and if Juries do "not prevent them, they may prove fatal to liberty, destroy government, "and introduce anarchy; but tyranny is better than anarchy, and the worst "government better than none at all."

I have thus, your Honors, gone through the long list of objections advanced on behalf of the defendant. I think I have made it appear,

That there was no variance between the charge alleged, and the words given in evidence.

That the piece was libellous.

That the defendant was in law the author and publisher, and that the libel being printed in his absence by his servant, did not vary the case.

That the Attorney General had a right to read in support of the charge, passages from other numbers of the Wasp.

That his Honor's charge was correct. Because, the Jury in cases of libel are not judges of the law and the fact,

Because, whether the piece was libellous or not, was not to be decided by the Jury,

Because, in cases of libel the Court can set aside a general verdict of guilty, it being in fact a special verdict,

Because, the intent is simply a matter of law to be decided exclusively by the Court on the return of the postea,

Therefore the trial ought not to have been put off, as the truth would not have been given in evidence,

Because, the Law of the Dean of St. Asaph's case is the law of this state; being founded on the common law of England in force in this state, recognised by the constitution; and not repugnant to, but congenial with its spirit; that this spirit requires only legal and known qualifications in candidates; exacting neither moral nor religious tests; but designing the peace and preservation of society, which calumny, slander, and libels, whether the facts they contain be true or false, are equally calculated to break and prevent.

For these reasons we contend that the rights of reputation are as sacred as those of property, and it is the duty of all equally to respect both; for, we must remember it is in the rights of others, that the roots of our own duties are laid.

It is to confirm those rights, and enforce those duties, that the present indictment has been preferred, and I trust the day is now arrived, in which, by the determination of your Honors, every citizen will lay himself down with the pleasing consolation, that his character, as well as his property, *his* peace of mind, as well as *that* of his family are equally protected by law.

Mr. SPENCER, Attorney General.

May it please the Court.

AFTER the very able and ingenious argument which has already been delivered on the part of the prosecution, I should perhaps be excused did I content myself with relying on what has been advanced, and refrain from any further troubling the Court. But as the indictment now before it, was carried on, and prosecuted with my concurrence, it may be thought my duty to add some few remarks on the occasion. On this idea alone shall I proceed, for I do not attempt to illustrate a subject which has been so completely exhausted. I beg to be understood as meaning to argue this cause on authority; not on speculative theories of what ought, or ought not to be the law. On these points, the two houses* now sitting, both above, and below us, are the only persons to dictate. I consider this Court as bound to determine according to former decisions; and, as to shew these, rhetoric and figures of speech, are by no means necessary; I feel, without further exordium, emboldened to proceed. Six points have been raised, and two abandoned. This latter circumstance I view with pleasure, because it affords a strong evidence of the candour of the counsel by whom we are opposed. The first question naturally presenting itself, and in the order of examination which the counsel who opened the case adopted, is, whether the trial should have been put off, in order to give an opportunity to the defendant to procure the testimony mentioned in his affidavit. This embraces three considerations. First, whether the defendant had made use of due diligence. Secondly, whether the facts disclosed were either in law, or reason sufficient to have entitled the defendant to put off the trial, in expectation of being able to procure the attendance of the witness he named; and thirdly, whether had the witness been present, his testimony could have been received. In Rex vs. D'Eon, 1 Black. Rep: 514, it is laid down by Lord Mansfield, and concurred in by the whole Court, that in order to entitle a defendant to put off a trial, he must be able to shew three things. First, that the witness is, in point of law from the matters shewn to the Court, really material. Second, that the party who applies has been guilty of no laches. Third, that the witness can be had at the time to which the trial is to be deferred. If all these requisites were not complied with, then was the Chief Justice right in denying to postpone the trial. As to the materiality of the testimony, that will be hereafter considered. It will at first be necessary, only to advert to the laches. If on this occasion it appear that the defendant has been guilty of negligence, or shall not have evinced due diligence, then the application was manifestly wrong. In civil cases it is incumbent to shew all due diligence. Much more so is this necessary in criminal, though I do not controvert that even those may be delayed. But notwithstanding this concession, certainly in these the evidence should be very satisfactory than an injury would be done, if the trial was not postponed. A man accused and conscious of his crime, will make use of every device to prevent bringing on the hour of trial. Therefore not only diligence, but materiality should appear. What does the affidavit disclose? As to diligence, nothing: as to a future day, hopes and expectations alone. Not one step is mentioned as having been taken to procure the witness, which he not

* The House of Assembly sits above, the Senate below the Court.

only *now*, but *ever* must have needed. The case shews that the indictment was found in January 1803. The trial did not take place till July last, and between these two periods no measure is adopted to procure Mr. Callender. What then is done? The cause was, *by the defendant* removed by certiorari. In this he was the actor, therefore he and his counsel must have known the time at which they proposed it should be brought on. Can one effort to procure his witness be shewn? Does the affidavit state any? It sets forth no act done, but merely *that he had good reasons to expect his attendance*, and that *he expects* to be able to procure the *voluntary* attendance of Callender at the next Circuit Court. I again ask what fact is here disclosed? No endeavour, nothing of active exertion is stated to have been tried. In civil cases, where a party offers to put off a trial, he must state affirmatively, the use of diligence to procure his witnesses. Had this been a civil, instead of a criminal case, (in which causes are not so easily put off) the uniform practice of the Court would have required a more full and explicit affidavit as to the acts done, and the foundation of the defendant's expectation.

If however this was not enough to warrant a refusal of the application to put off the trial, it is decisive on the subject to say, no reason appeared to shew the Court that the witness could be procured, at the time to which the postponement was asked. In Rex vs. D'Eon, the affidavit stated that the witnesses were *material*, and that the defendant expected to procure them, but as it also set forth that they resided in France, the Court in delivering their judgment thus expressed themselves. "They are all subjects of France. The presumption therefore is, (unless you shew a special ground to the contrary) that they will not come back to England. The presumption is otherwise in British subjects; that they will return to their native soil and domicil."—"In Steels' case, indicted for perjury, there was a full affidavit, that one Mathews, at Guadaloupe, was a material witness. The Court refused to put off the trial."—"In the King and Luckup, the Court would not put off the trial, till the defendant shewed a special ground for believing his witness would come over." The present case is exactly parallel with that which has been cited. The affidavit states that Callender is in Virginia. His domicil is there. Is it more to be supposed that he will return here, than that witnesses in France should return to England? There is no special ground stated for expecting it. Where witnesses are not of the country in which the trial is to be had, the Court invariably requires specific reasons to be stated, because no man, in legal contemplation, is to be expected where he is not domiciled. But it may be said, that, as the Chief Justice refused to put off the trial on another ground, it is now too late to urge what I have advanced as an argument against the application. But, though the reason assigned on the trial was different, yet, if it appear from the Defendant's own shewing, that it ought not to have been brought on, it is sufficient. The whole case is now before the Court, and the broad question is, ought the trial to have been put off on the affidavit or not?

It must be acknowledged that the principal inquiry in the court below, was, could the witness be heard in proof of the facts alleged in the libel. After what passed between the prosecutor and the defendant's counsel, I hope it will not be said that every fair invitation has not been given to the defendant to prove the truth of the allegations. On the part of the people, no objections were made to such proof,—it was even courted. But his Honor, the Chief Justice, did not consider himself authorised to hear any

testimony respecting the truth. The correctness of his opinion is now arraigned. To be sure it is extremely captivating to say, shall we not, in a free country, be allowed to give the truth in evidence? But to answer this question we must look to the law. If it be otherwise we must submit.—Whether it ought to be altered or not, is another question. At present we are to look only to the authorities.

"In criminal prosecutions, says Blackstone, 4th Com. 151. the tendency which all libels have to create animosities and disturb the public peace, is the whole the law considers:" and a little lower down he adds, "it is immaterial with respect to the issue of a libel, whether the matter be true or false, since the provocation, and not the falsity, is the thing to be punished criminally."

In 3 Woodeson, 138. the same law is laid down. "The chief intention of the law, in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from being their own judges, and to oblige them to refer their decisions to those, whom the law has appointed to determine them."

So, 2 Hawk. 128. B. 1. c. 73. S. 5. "It is far from a justification of a libel, that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since, *the greater the appearance there is of truth in any malicious invective, so much the more provoking it is.*" In Sec. 7, he adds, "A writing, defaming private persons, is as much a libel as those which defame persons intrusted with a public capacity; in as much as it manifestly tends to create ill blood, and to cause a disturbance of the public peace." For this he cites Moor, 627. 5 Rep. and a variety of other authorities. If any force of words can have effect, those quoted settle the point. They give also the reasons of the law. On one hand it may be urged, that in a government fixed on the basis of liberty, it is important that the citizens should know the conduct of their rulers. But if this loosens the bands of society, it must be universally granted, even facts should not be related, especially if they are such, with which the public have nothing to do; if they merely touch the private deportment and morals of the man. The law has looked to the broils, dissentions, and public disturbances which may be induced, to the animosities and hatred publishing even truth may beget. We are not at liberty to alter this, and say that the rule is not wisely founded. We have no power to brush away all authority on this occasion. A man may, and no doubt, in our private capacities, *we all do* estimate truth as beyond all price; but let us not, in a Court of justice, attempt, by altering the law, to usurp the power of the legislature. On this point the solemn opinion of the twelve judges, taken in the most solemn manner, is conclusive. They say, "It is wholly immaterial whether the libellous matter be true or not, the law taking cognizance of it as tending to disturb the peace of society, and create ill blood." This was not an opinion given under any influence from Lord Mansfield, against whom most unwarrantable insinuations have been thrown out. When we recollect how that great luminary has enlightened the circle of law; that his name will be for ever young; that he will flourish and live in never-dying youth, when all who are now both for and against, on this occasion, are numbered with the dead and forgotten in the grave, it must be matter of astonishment that he has been so reviled. But it was necessary to knock away, if possible, this weighty authority, to introduce the doctrines the defendant's counsel wish to inculcate. His charges, however, and the opinion of the twelve judges, were given before Mr. Fox's bill was passed, before the

statute now called a declaratory act was passed. It is singular that these great men should have been ignorant of the antient law, and it is still more extraordinary that this very act, which is said to declare what the common law originally was, does not mention one word about giving the truth in evidence on an indictment for a libel.

In D'Eon's case, Ashurst and Morton, his counsel, treated the suggestion, that they had said the truth could be adduced in testimony, with much resentment. They considered it as an insult to their legal reputations, and mentioned it with contempt and disdain. They say, "D'Eon never "thought, nor was told that the truth of the facts alleged in a libel, might "be given in evidence."

It is admitted, by the counsel opposed, that since the revolution, for the long period since 1688, all the authorities are decidedly against admitting the truth in evidence. The origin of the rule has been carried a little further back, and it is stated to have arisen, at the period of the restoration, to enable one part of the nation, to hunt down the other. The old common law is said to be otherwise, and ever since the return of Charles the 2d, the judges in Westminster Hall either perverted the law, or were totally ignorant of it. It is, however, left for the ingenuity of the present day to shew, that a course of opinions adopted and acquiesced in for more than a century, were founded on misapprehension of the law. By the new light now obtained, the statutes of Edward 3. Rich. 2. and Philip and Mary, have been discovered, and they are cited to prove the common law. The answer to the arguments derived from them, given by my associate counsel, is conclusive. They gave new remedies. Atkyns Justice says, in Lord Townsend vs. Hughes, 2 Mod. 159. to proceed under them, the libel must have been horrible as well as false. All the statutes were to give particular, and new punishments. By that of Westminster the 2d, the offender is to suffer imprisonment until he produce the author of the report. By that of Richard 2. the same punishment is inflicted, and a qui tam action given. In prosecuting this, however, the opinion of the Court, in the case cited, was, that if a scandalum magnatum were brought on the statute, the defendant could not justify. Ibid. 166. On the act of parliament, passed in the time of Philip and Mary, it is unnecessary, I hope, to say the dreadful punishments there inflicted, were not of common law ordaining. The falsity is necessary in proceedings under them, because they depart from the common law; but never, till yesterday, was the idea entertained of referring to these statutes for proof of what that law was.

Great reliance has been placed on the word false being in the precedents of indictments for libel. A full answer has already been given. In the case of Rex vs. Burks, it is even stated that of late times the greater number of precedents were without the word false: this too was after a search for precedents had been directed.

In actions for assaults, the act is said to have been committed with staves, sticks, knives, &c. and thus are *all* the precedents, but an argument that the use of them must be proved on the trial, would receive very little attention in this Court. As little it is hoped will be paid to the reasoning taken from the practice on informations. In addition to what has been observed in answer, I shall only say, the application then, is to the discretion of the Court for liberty to proceed: they therefore may exercise that discretion as they please. In the next place, an information is without the intervention of a Grand Jury; and being so, is, in a degree, odious to our law. But when leave to file an information is once granted, the trial is

conducted exactly on the same principles as govern in cases of indictment, and the truth of a publication can not be offered in evidence. But against this doctrine the Court will lean from the very nature and genius of our government. By the 35th section of our constitution, and which has been already cited, the common law of England is made the law of this State. By that common law, proved by Zengar's case to have been adopted in this country, libels on public and private characters are punished without admitting proof of the truth to be received. The reason of this is, over and over found to be, the tendency of such publications to break the peace. Does not our government admit this principle? Can its form create a difference in the reason of the law? That in a free country printers have a right to speak boldly and inform the people, never has, and I trust never will be questioned. But in what state are our news-papers now? will it be said this is their object? By them every man is set up as a mark to which the arrows of calumny and slander are directed. This we trust is not the result of our elective system.

It never was the law that the doctrine of libels, as already given, related only to persons who could not be removed from their places. Let it not be said that freedom is unknown to the British nation, for though they may not possess it in as full a degree as ourselves, let it be remembered they have this peculiar characteristic, that they know not of slavery, and the very touch of their soil is in itself an emancipation. The statute of the 32d G. 3. c. 60. confirms the rights of jurors on another point; but as to this of giving the truth in evidence, it is totally silent, and even allowing it to have been a declaratory, it is singular that it did not declare the law in this respect, if any alteration was intended.

The next objection made to the charge of the Chief Justice, is that he told the Jury the intent was not within their province, but purely a matter to be decided on by the Court, on the return of the postea. Against this it has been urged, that the jury may bring in a general verdict, and thus resolve both the law and the fact. For this 3 Dall. 4. has been cited, and after adverting to the opinion of Jay, Chief Justice, in that case, it really seems that the dispute is one of words, rather than of substance. If by right, power be meant, then we are all agreed. But if it mean to infringe that salutary principle, which says, on questions of law, the judges, on questions of fact, the Jury shall decide, I must think Chief Justice Jay, was incorrect. That he was breaking down the bulwark of legal security. Whenever the fact can be separated from the law, it is the duty of the Jury to leave the latter inviolate. Will the counsel on the other side extend their own principles to all cases? would they be willing to have it adopted in civil actions? where property, where persons are affected, on every occasion where a general issue is joined, would they consent that the verdict of a Jury should be final?

After the severe animadversions which have, on the part of the defendant, been bestowed on Lord Mansfield, it may perhaps be rather a bold measure to quote his name; but I shall still venture to refer to the reasonings of his Lordship, in the case of the Dean of St. Asaph, 3 D. and E. 491. (*n*) "Where the questions can be severed by the form of pleadings, "the distinction is preserved upon the face of the record, and the Jury "cannot encroach upon the jurisdiction of the court. But where, by the "form of pleading, the two questions (of law and fact) are blended toge-"ther, and cannot be separated upon the face of the record, the distinction "is preserved by the honesty of the Jury. The constitution trusts that

"under the direction of the judge, they will not usurp a jurisdiction which "is not their province. They do not know, and are not presumed to know "the law; they are not sworn to decide the law; they are not required to "do it. If it appear upon the record they ought to leave it there, or they "may find the facts subject to the opinion of the Court upon the law. But "upon the reason of the thing, and the eternal principles of justice, the "Jury ought not to assume the jurisdiction of the law; they do not know, "and are not presumed to know any thing of the matter; they do not un-"derstand the language in which it is conceived, or the meaning of the "terms; they have no rule to go by, but their passions and wishes. It is "said if a man give a right sentence, upon hearing one side only, he is a "wicked judge, because he is right by chance only, and has neglected "taking the proper method to be informed: so a Jury who usurp the judi-"cature of law, though they happen to be right, are themselves wrong, "because they are right by chance only, and have not taken the constitu-"tional way of deciding the question. It is the duty of the judge, in all "criminal cases, to tell the Jury how to do right, though they have it in "their power to do wrong, which is a matter between God and their own "consciences." In the former part of this case, ibid. 429. the same learned judge says, "By the constitution the jury ought not to decide the "question of law, whether such a writing, of such a meaning, published "without a lawful excuse, be criminal: they cannot decide it against the "defendant, because after a verdict it remains open upon the record. There-"fore it is the duty of the judge to advise the Jury to separate the question "of fact, from the question of law, and as they ought not to decide the "law, and the question remains entire for the Court, he is not called upon "to tell them his own opinion. It is almost peculiar to the form of a pro-"secution for a libel, that the question of law remains entirely open to the "Court, upon the record, and that the Jury cannot decide it against the "defendant; so that a general verdict, that the defendant is guilty, is equi-"valent to a special verdict in other cases. It finds all which belongs to the "Jury to find, and finds nothing as to the question of law. Therefore when "the Jury are satisfied of every thing within their province to find, they "have been advised to find the defendant guilty, and on that shape to take "the opinion of the Court upon the law; and no case has been cited of a "special verdict, in a prosecution for a libel, leaving the question of law "upon the record to the Court, though to be sure it might be left in that "form, but the other is more simple and better."

If these are not wholesome doctrines; if they do not find their way to the judgment and conviction of every man, weak indeed are those boast-ed rights of our jurisprudence, in which we have attempted to provide, one part of our system to ascertain the truth of facts, and another to settle the rights of law. Can words be more emphatic than those which have been cited. All argument seems to be superseded by the mere quotation.

As, however, some authorities were adduced by the opposite side, to shew that the intent was matter of Jury inquiry, I shall, as they have been passed over by my associate, take some short notice of them.

The first that has been mentioned is the Queen vs. Drake, 11th Mod. 86. The question there was on the effect of a variation of *not*, for *nor*, in setting forth the tenor of a libel. Lord Holt there says, "An information "for a libel may set forth the libel in Latin, neither ought the whole to be "set forth, but only that which is libellous in itself, and then, at the trial, "if it appears on evidence that, from the whole book, the words extracted

"are not libellous, the defendant must be acquitted." This position was never doubted. But it does not shew that the Jury are to decide on the quo animo. It only proves that the context must be resorted to. If in the present case it had altered or impaired the sense of the libel alleged, then indeed the Chief Justice did give a wrong direction.

Rex vs. Beere, 2 Salk. 417. was also brought forward for the same purpose. There the Jury found the defendant guilty as to the writing and collecting, "prout in indictamento supponitur, et quoad omnia alia præter "scriptionem et collectionem, "not guilty."—Yet the Court gave judgment for the king. Neither in this, nor the citations from 15th Vin. 88, 89, is contained a word in support of the argument for which they were introduced. As to Viner Tit. Evidence, 218. pl. 4, it is nothing more than the case of Rex vs. Beere at full length.

To ascertain whether the intent is matter for Jury consideration, it is necessary only to ask whether it is the intent only which constitutes the offence. There is no proposition more clear than that the writing and composing a libel is unlawful, and that the view with which it is done is perfectly immaterial. Being an act criminal in itself, whatever may be the motives with which done, it is equally capable of producing the disorders which render it a crime, and therefore of the quo animo, it can never belong to the Jury to judge. At the time, however, in which I make this declaration, I am ready to admit there may be exceptions to this rule. This is also acknowledged by Lord Mansfield. No doubt there may be a case in which a man may do an act, which, if considered abstractedly, is in itself criminal, and yet that act may be accompanied with a circumstance which may amount to a lawful excuse. This is the sense in which Lord Mansfield's words are to be taken, and they will not then be found to be so very inconsistent.

A man may hand a libellous writing to another; this is, in law, a publication; but if, when he delivered it over, he knew not the contents, it might possibly destroy the legal inference from the act. But whether it does so or not, is for the bench to determine. When the act is malum in se, the intent is not for the Jury. Writing and publishing are not crimes; but writing and publishing *a libel*. On an indictment for this offence the whole corpus delicti is spread on the record. This may possibly have rendered the case of libel somewhat peculiar.

The numerous cases cited by the counsel associated, on behalf of the people, prove that the doctrine complained of did not originate either with Lord Mansfield, or Lord Raymond. In the King vs. Dean of St. Asaph. The former of these great characters says, charging a Jury in the manner now objected to, had never before been complained of. He himself had done it from 1756 to 1789, without hearing a cavil raised. Yet it is said, the inconvenience which arose from the obedience to his direction, by one Jury, who delivered their verdict in his very words, manifests the absurdity of his charges. It is urged a new trial was granted in Rex vs. Woodfall, because the Jury found the defendant "guilty of printing and publishing "*only*." Lord Mansfield himself may perhaps be as good for authority the reasons of the judgment as the learned counsel by whom it has been cited. By adverting to the case, we find his Lordship declaring, that if the Jury meant to say "that they did not find it a libel, or did not "find the epithets, or did not find any express malicious intent," it would not affect the verdict. He adds, "it is possible some of them meant not "to find the whole sense and explanation, put upon the paper by innuen-

"does," and for that reason was a new trial granted. In Rex vs. Horne, Cowp. 672, the intent is asserted to have been expressly left to the Jury. That was a prosecution for a libel "of and concerning" the King's troops. Whether it related to them, and was so intended, was the very crime. In cases where the reference is to foreign matter, this is indispensable. In such the subject matter may be explained: and as it is extrinsic, the intent of applying what is written to *that*, is a pure fact. Every paper, every writing that is to have a legal effect, is invariably to be construed by the Court. In titles at law, in contracts, in any other matter. The cases of killing, felony, forgery, &c. involve intent, and the Jury must find it before the legal inference can arise. Loft's reasonings on this point have been triumphantly adduced, but where is the author on whom he pretends to comment? Why is not Baron Gilbert himself brought forth? Mr. Fox's act, as it is called, is also adduced in support of the tenets opposed to us. Allowing it to be, as is contended, a declaratory statute, it is not binding here. To us then it is but an evidence of what the law anciently was, and against this we have to oppose the opinion of the twelve Judges, and the whole stream of authorities, for more than one hundred years. Can any one hesitate in declaring which side of the scale ought to preponderate? On the one hand, there is a mere solitary word, by dint of sophistry applied to the question: on the other, the unequivocal declarations of the good, the great, and the learned in the law for one hundred years; we are to decide from the two as on a matter of testimony. Ask any American if he will be bound by a British act of parliament enacted since the revolution? The sedition act is also now relied on. I and all who have heard me will remember that it was, by the very party who passed it, boasted of as an amelioration of the common law; yet, it is now appealed to for the purpose of shewing it to be declaratory of that very law. Ought the assertion of any gentleman at this bar, respecting the principles of a British statute, to be received in contradiction to an English Judge? Our opponents tell us the 36th, Geo. 3, is a declaratory law; Lord Kenyon, in Rex vs. Holt, 5 D. and E. 444, speaks of it as an innovation. On a matter of evidence he says, "It "has been argued however, that the evidence was rendered admissible by "the late act, which enables Juries to decide on the whole question. It "appears to me that the defendant has had the full benefit of that statute." That Croswell did no more than reiterate the charge, is used as an argument in his favor. Holt first alleged it. The defendant only repeated it, and asked its refutation. Every new publisher makes the crime his own. In Rex vs. Holt, the Court were unanimous that it was improper to admit evidence that another had published, or was the author of a libel. Grosse, Justice, says, "It does not follow, that because one libeller has not been "punished, another should not, even for the same publication." In the train of reasoning used to shew the hardships under which the defendant laboured, it has been intimated, that the present indictment was a most improper and injudicious selection. That an earlier and other example might have been offered. I know not of any more fit, than of a man who starts the enemy of our whole republican administration, professedly as he states it, to "whip the rascals naked through the land." It is allowed that time, place, and circumstance in these prosecutions, are all important. If so, is not this a case of the highest importance? If against any one it was right to proceed, was it not against the defendant? His charges were against the head of the nation. Against him to whom our free government owes so much. If this then did not call for prosecution, I do not know what can

be an object. If the present offence was to pass unnoticed, speeches, writings, and publications against both our Legislature and our Courts, would have a claim for toleration. Can it be thought that we are to restrain liberty of speech, and the licence of the press to be unchecked? Shall the words we have uttered, be under the controul of the Court, and the words we have printed be out of their jurisdiction? It may as well be argued, that, as we are free, we may do as we please. The answer is, so you may, provided you effect not the person or rights of another. Liberty consists not in doing what we like, but in doing at our will and pleasure those things only, which infringe not on the happiness or properties of others. If we thus deport ourselves, it is impossible to imagine we shall, from the corruption or iniquity of any Judge, be exposed to the dangers of prosecutions and informations. A court of law neither will, nor can endure an argument founded on the idea of a Judge's not discharging his duty, or attempting to deny justice. Yet all and more than this must be conceded, before we can hearken to the doctrine, that permitting libel or not to be decided on the return of the postea is dangerous, because the context forms no part of that which appears on the record. But in this position there is infinitely more of plausibility, than soundness. It is a reason purely ad captandum. Upon a motion for a new trial, the Judge is bound to report all the facts, and if he were arbitrarily to refuse it, the Court would receive information by affidavit. The defendant has it in his power in this manner to shew the context, and if it qualify, or render innocent that which would otherwise be a libel, there can be no danger of punishment, for judgment must be arrested. It cannot, it is true, go to the court of errors on a writ of error; but difficulties of this sort are not confined to the case of libel. No writ of error lies in treason or felony, without the fiat of the Attorney General, 4th Hawk. 502, Sec. 13, and in this state on an order from the chancellor. Neither in any trial on an indictment does a bill of exceptions lie.—4 Hawk. 457, 1 Sec. 85, 1 Keb: 384. This seeming difficulty is perhaps far less dangerous, than allowing a Jury to decide in all cases the question of law, whether libel or not. Here lies the risk and hazard of their perjuring themselves. They are sworn to try according to the evidence. Of that the law is never made a part. They are not judge of it; shall we by leaving to any twelve laymen, however upright, unsettle the fixed principles of our jurisprudence, and render the whole uncertain and precarious? Little did I think to hear a serious argument against reading the prospectus, or other numbers of the Wasp. They were all in evidence. Though the intent was not to be enquired into by the Jury, the reading the other numbers would not vitiate; it was merely explanatory to satisfy the Jury. According to this principle, it is laid down in 4 Hawk. 453, S. 133. "If a crime "has been proved in the county in which it is laid, evidence may be given "of other instances of the same crime in another country, in order to sa-"tisfy the Jury." The fact of publication was questioned, and to substantiate that part, it was proper to read numbers proved to have been bought from the defendant himself. It was done to evince, at least to create a presumption that he was privy and assenting to the publication. I have not attempted to embellish or adorn what I have had to advance. The points raised must stand or fall according to the law. It is in the code of our jurisprudence that the principle of this day's adjudication must be found. We contend that in all respects, they will warrant the charge of the Chief Justice, and the conduct observed at the trial on the part of the prosecution. If we are right, we have on our side the law of the state, and we trust that

will be found sufficient to support us against the talents and eloquence of the other side.

Mr. HARRISON contra for the Defendant.

May it please the Court,

I HAVE been accustomed to consider this as a cause of the utmost importance, as involving the rights and liberties of the press. Perhaps it is impossible for talents, feeble as my own, to do justice to the subject; but though this may be the case, I feel an honest zeal in the part I am destined to take. The abilities displayed against us, have been considerable indeed. We have seen the elegance of Cicero, combined with the fire of Demosthenes. The gentleman who first spoke on behalf of the prosecution, has culled the choicest flowers of rhetoric to make *into a nosegay*,* to present to the bench. He has spoken of the daggers of defamation, and though I do the highest credit to his ingenuity, I am sorry to find his talents displayed in a cause, which tends to destroy the happiness and liberty of the people. The encomiums bestowed on Lord Mansfield's name, amount almost to adoration. I admit that he is entitled to the highest respect, and even that his errors ought to be looked at with an indulgent eye. That if he has taken the lead in stating the criminal law, on the subject of libels, a little further than he ought, we should draw a veil over this offence, and venerate him for his exemplary talents. I agree that the common law is the test by which this cause is to be tried; that it is recognized by our constitution, and infinitely to be preferred to French fanaticism: that in the first convention of those who met to frame our constitution, it was claimed as one undoubted right, and best inheritance. Unfortunate will it be if the opinion be ever entertained that it is not the best system we can live under. But the question is not, whether the common law is to be referred to, and we to be governed by it? The question is, are we to search for it in the Anglo-Saxon laws? No; that law inflicted not only the cutting out the tongue, as has been already stated, but in other cases it ordained the most barbarous punishment. Yet for murder it allowed of a pecuniary compensation, in their code, known by the name of weregild. Thus we see that the price of a word was a tongue, of a life money. A reference therefore to those times can never form the law of the present day. I shall proceed now to the question, and speak to it in the best manner I can, leaving the masterly treatment of it to the able hand by whom I shall be followed. The first point is of considerable difficulty, and great importance; nor do I know that it is in my power to throw any new lights on the subject, it may perhaps be enough to only enforce those arguments already offered by the counsel who opened. Even on this I shall endeavour to do but little, and leave to the court to draw the inference of law. In however, what I do propose to myself, the test I mean to resort to is the common law of England. A system which we have received from our ancestors, and which unless altered, must be the law of the land.

The first authority adverted to by the other side, and which I have looked into, to see whether applicable to this question, is from Bracton, 155.

* The Spectator, in one of his instructive and amusing papers, says, to judge of a figure of speech, we should imagine a painting of that which it represents. It would be unkindness to the talents of the great law character who now speaks, to make, in the present instance, this the criterion.

It has been truly cited, and no doubt the name of Bracton is considered by every lawyer, with great respect. But he borrowed largely from the civil code, and introduced it wherever he thought ours defective. He states, in the passage adduced, a libel to be "carmen famosum," here making use of the very expression appropriated to this kind of writing in the civil law. It is argued, however, that if it was possible to give the truth in evidence, on a trial for a libel, Bracton would have mentioned it, and that his silence is conclusive on the subject. If this be the unavoidable deduction, then in an action for an assault and battery, that it was done in defence of himself, or his wife, would be no plea to the injury complained of. With respect to slander spoken, the "convitium dictum," the very same reasoning may be used. Bracton says not that the truth may be given in evidence: and yet who is there that will assert the contrary? All that can be inferred from him is, that he took his notions from the civil law, and as to what constituted a libel, or the evidence on the trial, he says nothing. He does not declare the truth may not be received, nor that the greater the truth, the greater is the libel. On these two points, he leaves the questions perfectly at large. That he should have done so is natural. In his time those disquisitions could not have attracted public attention. The art of writing was a rare qualification, and printing did not exist. It consequently is not very likely, that in the old books, many allusions on this subject should be proved, because they could but seldom present themselves. Fleta is silent, he leaves it as Bracton found it, and this latter considered it as merely possible there might be such an offence, but utters not a word as to the rules by which it was to be governed. Barrington, in his observations on the antient statutes, tells us, that in the old books very little is to be found before the case in Lord Coke's Reports, de famosis libellis. It is not therefore to be expected that we should produce a considerable number of decisions. But we can bring forward some. These are the antient records in the third institute. We are indeed informed, but not very particularly, that they are of no consequence, and some other books have explained them, so as to shew, they do not affect this discussion. But Lord Coke as to the second record, that of John of Northampton, gives the very words: and the lawyers of his day did not depend on reports, but on the very records themselves. These in general contained not only the judgment, but the reasons on which it was given, we have therefore in that the very words. "Quæ litera continet in se nullam veritatem, ideo, &c."* If the truth was immaterial, how does it happen that the judges should rest, on the libel's containing no truth, the decision of that case. If the maxim be correct, that the greater the truth the greater the libel, the record should have been that we punish you because the crime is the same as if it was the truth. These are the most antient fountains of the common law to which we can have recourse. They are the records preserved by a lawyer of the first eminence, and whose works have had the peculiar distinction of having been published by act of parliament. Having this evidence of the times of old, we may ask what have you to produce?

We find, however, that the whole of the English law of those days, appears to be in perfect unison with the records preserved by Lord Coke. That all the antient statutes against spreading news, or telling tales, contain this express ingredient, that they shall, to render liable to punishment,

* Vide ante, the reason of the judgment set forth between the "veritatem," the "ideo."

be false. But admitting these to be cases of scandalum magnatum, in which falsity is the essence of the crime, will they not tend as much to the disseminating discord as in other libels? It is doing violence to say, that you are to punish men for speaking truth, when the statutes are levelled only against falsehood. With respect to the statute of Ed. 1, however rare the art of writing then was, it appears from Barrington, that about twelve years before it was enacted, a libellous song respecting the King's brother, had been scattered through England, and was the cause of passing the law. It follows, therefore, if he is right, that all things now urged for the positions on the other side, presented themselves to the parliament: they had seen the libel as affecting the character of a relation to their governor, and they fix the point on this criterion, that it shall be false to make it a crime. For if true, the publisher was to go free. Had therefore the common law then existed in the manner which it has been stated, that every man, who wrote any thing reflecting on the character of another, whether true or false, was guilty of a libel, (if what is true may so be called) where was the necessity of the act? The common law presented a stronger remedy, and the statute would never have been thought of. We must therefore conclude, that in the simplicity of ancient days, when untainted with our vices, truth could not be a crime, and I feel happy in thinking the time is again advancing, in which we may, in the language of the apostle, cry out, "truth is mighty and must prevail." It was on this principle the old statutes were passed. The authority they furnish lies within a narrow compass: the reasoning is obvious. The Court must draw the conclusion, that the truth would then have been a justification.

On the statute of Richard I shall say nothing, for nothing has been said against it. After this the contests between the houses of Lancaster and York took place. During these the voice of law was drowned in the din of arms. The nation at length, by the accession of Henry the seventh, began to enjoy the blessings of internal peace.

In the reign of Henry the eighth, from the same causes as those in that of Charles the second, they extended the bounds of prerogative beyond all that was ever known, and established almost a despotism in Great Britain. It was now that the high commissioned Court of the Star-Chamber came into operation. This tribunal, it is well known, arrogated powers and acted on principles unknown to the common law. It is from thence that its judgments are known by the appellation of Star-Chamber decisions. Wherever, therefore, such a determination is mentioned, it is ever adduced as one of oppression. This Court was proceeded on, and was fostered under the house of Tudor; and before the end of that race, the common law had received another interpretation. Want's case, decided in the Star-Chamber, is the first that held a libel was equally a libel, whether the matter it contained was false or true. It was in consequence of this, that when a man was attacked by a publication of his vices or his crimes, that recourse was had to the Star-Chamber, and not to the common law. It is from that time, from that ominous æra that we are to date the modern decisions, that truth is not material in questions of libel. Lord Coke himself, when Attorney General, even in a case before the Star-Chamber itself denies this doctrine. True it is, as one of the counsel against us has stated, that Lord Hobart in that very case did say, the law was otherwise laid down. But then the baneful tree had taken root, and was too strong and fixed to be eradicated. Some time afterwards, in the reign of James, the famous case in 5 Rep. 125. de famosis libellis, appears to have been de-

termined. In that case, the opinion given against the right of shewing the truth was extra-judicial. This I say on authority. For this I quote Barrington on the statutes, and if he will not bear me out I cite the case itself, for, on the face of the proceedings, it appears that the defendant, when brought into Court, acknowledged that he was guilty, and did not pretend the charge was not true. The Court, therefore, had only to pronounce their sentence.

They go on, however, to state their reasons, and specify certain propositions, or principles on which they found their judgment, and all on a case not before them. The whole then depends on their dicta. The point hardly appears to have been questioned in the English law. It seems to have been taken as settled, and for granted that the truth cannot, on a libel be given in evidence.

The British lawyers do not appear to have taken the trouble that we have; their determinations are not binding on us. If they have mistaken the common law, it is the duty of our judges to rectify their errors. It is a most pernicious doctrine that it is in the power of a Court to vary the common law, and though their decisions are shewn to be contrary to it, to say they must be implicitly received though contradicted by that code, the rules and precepts of which they ought to follow. When the law cannot be antecedently traced, and judges have given opinions on which we have proceeded, and which do not appear opposed to the common law, they ought to be adhered to. But when decisions are seen to be repugnant to the common law, they ought to be treated as usurpations of power, and thrown aside. If inconveniences arise, they are to be amended by the legislature, not by the Courts.

Every man conversant in legal reading knows it is common to say of such and such a case, it is not law: therefore in the present instance we may deny *that* in 5 Rep. 125. de libellis famosis; for notwithstanding a whole train of Star-Chamber decisions, and of judgments founded on them, not one indictment for a libel, till of late years, has ventured to omit the word false. What can be assigned as the reason of this? That it was necessary at common law, whatever might be the case in the Star-Chamber. These sentiments appear to have prevaded the profession, and to have broken forth whenever an opportunity offered. One of the honestest men of whom the law had ever to boast, Mr. Justice Powel, in the case of the seven Bishops, says the falsity must be proved.

If these doctrines now insisted on, were so well established, and so perfectly known to be the common law, could this eminent judge have been ignorant of it. Would he not have said, that as you have written it, the truth is the greater libel. But he says it must be false to constitute the crime. I shall not dwell on this case, for it must be the common law, Star-Chamber decisions out of the question.

If these doctrines are as we contend, if thus is the common law, if it has, even by the British Parliament, received no alteration, then it must be conceded, that thus was the common law, when this colony was first settled. If we did bring this common law with us as our birth-right, it must be such as it really was, and not what certain judges have been pleased to declare it should be. Even decisions in our own Courts would not make it otherwise. Not even Zengar's case, though it has been cited to shew that the truth could not then be received. But we know that even then, that decision was universally reprobated. If too we call to mind the party spirit which at that time prevailed, it will be of a very doubtful, if of any au-

thority. If we are right it must be contrary to law. But when precedents are cited, they ought to be from a continued course of decisions of upright judges, or they ought to be, from one or two great cases above all exception; manifesting such knowledge and research as to evince that the whole matter was well examined. What is the doctrine on this point, in the case de libellis famosis? a mere dictum in a cause; a declaration not consonant to the general rules of the common law, and precedents founded on it. Therefore, this decision, if so it may be called, can never be set up against the testimony of precedents against the common law, such as we have shewn it. There is an embarrassment on this subject, arising from the practice in England. Whether it be inconvenient or convenient, I have not inquired. Perhaps they have been led away in that country, from the apprehension that the disclosure of truth may tend to bloodshed, to treason, and other public disturbances. Finding this, they may have greedily catched at the doctrine, that the common law of England excludes the truth.

I shall now pass on to a subject on which the law is still more clear than on that on which I have hitherto addressed the Court.

I do not here notice the technical objections of the Attorney General, as to putting off the trial; because, if I am rightly informed, the judge before whom the cause was tried was willing to rest it on this very point, whether truth could, in a prosecution for a libel, be given in evidence. I shall only add that a commission from one State, might on such an occasion be executed in another, and that in cases where the prosecutor will not consent to its being issued, the Court, for the sake of Justice, will put off the trial till he does.

I shall now consider whether, on a question like the present, the whole matter ought not to have been submitted to a Jury, or whether they were rightly confined to the mere fact of the publication, and the truth of the inuendoes. This undoubtedly is of the utmost importance. It is a question which has not only with us profoundly agitated the public mind, but has equally done so in the country from whence we originated.

In all cases whatsoever by our law, where a man is to be tried criminally, the general issue alone is to be pleaded. If a man accused of murder, treason, or any other offence, be arraigned, he is not at liberty to spread any thing on the record which may go in justification or excuse. In cases of libel the whole is submitted, under the general plea of not guilty, for the consideration of the Jury. This will, on minute investigation, be found not to have been antiently done in any other cause, less than criminal, In civil cases the party was obliged to plead the special matter, and thus bring it up for Jury determination, if a fact within their cognizance. But in criminal cases the general issue alone was allowed; collateral inquests, however, always excepted, but which do not form the main question to be determined. In all civil cases the Jury tried the fact under the idea and dread of an attaint. On criminal proceedings it did not lie. What then is the inference from this? That it was the policy of the law that rather twenty guilty persons should escape, than one innocent person be found guilty. It is meant therefore that in all cases the Jury should have the power to decide on the law and fact, under the direction of the judge. I know against this has been repeated the maxim of ad questionem facti respondent juratores, ad questionem legis, judices. But in answer to this, I say, the maxim relates to questions which are put on the record. Such as are made the issue of the cause (whether in law or in fact), and in which the whole matter to be legally decided may be set forth. For instance, on

a question of disseisin the Jury may submit the whole facts, and so as to assumpsit. In criminal cases they may do the same, and thus ease themselvee of the burthen of determining the law on the subject. But still the Jury retain, and so our elementary writers tell us they had, the power to decide law as well as fact. If they had the power, it consequently was the legal power, and therefore they possessed the right. It is in vain to say the power does not include the right. Wherever the law gives a power it confers the right to exercise that power so, otherwise uselessly, bestowed. It is a solecism to say they have the power to judge of the law and fact, yet do wrong by judging of them. But I am no contender for any thing which may shew disrespect to the Court. I admit that it is prudent for a Jury, where not conusant of the law, to take the advice of a judge. But let me suppose a case where the evident inclination of a judge is manifested to convict whether right or wrong, on facts where a Jury are convinced the law will not warrant a condemnation. If they see a man about to be sacrificed by a tyrannical judge, shall they not have the power to rescue him? may they not do it? Forbid it reason, forbid it the laws of our country. Seeing juries formed of respectable men such as ours are, shall they not have good reason to acquit, if they have made up their minds that the facts do not warrant the charge? If they feel this, it is the duty of a Jury to come forward and say, whatever deference we in general have for the bench, yet this is a case in which we will acquit. We will not suffer the over-bearing conduct of any Jefferys to prevail. These indeed are suppositions of extreme cases, but as they have arisen once, so they may again. Such I say is the power of a Jury by the decisions of the law, and our constitutional provisions, therefore I repeat that they have a right to exercise it.

When we trace the law on this point, we find it settled by a firm legislative authority, by a declaratory statute, by Mr. Fox's act as it is termed, that the law is as we contend.

Judges in England declare, from the cases cited by the counsel associated with me, that in *that* country, and by them the whole matter was submitted to the Jury. This certainly was so till the time of Lord Raymond. That this was not so, no authority can be adduced. The case in which Lord Raymond presided, is to be considered the leading one on this subject. To be sure he is to be held a learned judge and a good man. But perhaps in that case he carried the law of libels beyond what reason would support. He there laid the foundation of the authority, and it was adopted by Lord Mansfield in the famous case of the Dean of St. Asaph. But even Lord Mansfield himself fixes the æra of its commencement from that date. Yet this Lord Mansfield, this luminary, this man who has shed such light over the science of jurisprudence, in Rex vs. Horne, 11 State Trials, 288. says the jury are "to exercise their judgment as to the intent." Does not this give a direct answer as to all that is by the other side, of looking only to the writing and publishing. Surely if ever an authority, from the mouths of our adversaries, is to prevail, this must substantiate our position. I take the words from a most accurate lawyer, from Mr. Hargrave the publisher of this trial. Thus then, with respect to this doctrine, whatever was Lord Raymond's opinion, whatever the conduct of other judges, yet Lord Mansfield himself gives up the point, for which we contend. He does give it up, and that in the case of a libel, falling within none of the exceptions which have been put. If this is so, how are we to rely on what he says in another case; that he never did do any thing of the kind. Perhaps

he had grown old, and did not advert to his own doctrines. But to make the common law on this subject, to make any thing as a rule which in any one instance contravenes the principles of our criminal code, there ought to be shewn one uniform stream of decisions. Instead of this, they admit. till the time of the revolution, none are to be found.

They rely on Lord Raymond and Lord Mansfield, and after having done this, they say, these are authorities that are irresistible. We say it does not appear that the stream has constantly been in the same channel, therefore this is not to contravene the common law, such as we have shewn it. In order to have such an effect, an uninterrupted current of decisions should have been produced. They should have shewn that no judge ever differed from Lord Mansfield. But Lord Loughborough appears against him. He, as a party man, may have been in some measure objectionable, but, as a judge, as a man of talents he certainly stands high. He comes forward in the house of peers, and says he never understood the law to be as laid down by Lord Mansfield. That he had ever charged the Jury, that the matter lay with them, though it would be prudent to consider the charges as to the law, according as the bench might pronounce. But never did he charge a jury to confine themselves to the proof of the publication, and the meaning of the inuendoes. Even if Lord Loughborough is not such an authority as to do away all cavil, look at the venerable Earl Cambden. That man was, from his earliest days, one of the steadiest patriots Great Britain ever knew, whose judgment was as correct as his heart was honest and upright, he steps forth and informs that august assembly, before whom he spoke, that he had ever understood the law to be the reverse of Lord Mansfield's positions; that in all cases of libel which came before him, he had ever acted contrary, and pursued a different system. We all know that of opportunities to act, he had an abundance?

Can it be said then that there is the consent of all the judges to what we term an alteration of the fundamantal principles of the law? To the honour of Lord Cambden be it said, that he admired the talents of Lord Mansfield, but asserted the law to be as he himself contended for. Thus then stands the matter, as to the opinions of the judges and form of precedents, after considering also the principles of our law as to criminal proceedings. What is the conduct then of those peers, (who by the constitution of England are judges also) when they are applied to for their opinion on this subject?

The arguments of Lord Loughborough and Lord Cambden, are held to be the law of the land, and by the deliberate voice of the nation Lord Mansfield and the judges who adhered to him, are declared to have been mistaken. The parliament passes an act that the whole matter shall be submitted to the Jury, and they are to give their verdict on the law as well as the fact. It has pleased one of the counsel for the prosecution, to consider this as a matter of evidence against the judges and the house of commons. But it was a great contested point that had called up the abilities of all the great men in that mighty kingdom; so far was it from being the effect of passion, that to the honor of the country be it spoken, men of all parties joined in saying, the law had been mistaken; that therefore they would declare what it was, and what it should be in future ages. Something has been urged to shew this act was not considered as a declaratory law. In the trial of Hamilton Rowan, it is expressly mentioned as such by the Chief Justice. It has been so mentioned, and there can be no doubt of its being a declaratory statute. The two noble Lords I have particularly

mentioned, thus considered it. The whole matter ought therefore to have been left to the Jury. It is not to be supposed they would hear the law and pronounce against it.

In a case where the matter is brought home, and the wicked intention shewn, there can be no idea that a Jury would go against a Judge. If we are right on this point, if we are correct in our reasonings, and our law, there is an end of the case, and a new trial must be granted. If the intent is to be the constituent of the crime, it is plain that it must be a matter for Jury determination. Allowing then that we are wrong in saying the Jury have a right to judge of the law and the fact; still, as the intent is the fact which makes the crime, we are right in asserting that on this the Jury ought to decide. The Court may say, there is in the publication ill will and an intent to subvert the government, but if the Jury cannot draw the same inference, they ought to acquit. If on the other hand, the charge should be the reverse, and they are convinced that the defendant did intend to disturb the public peace, they ought to find him guilty. This will reconcile the cases. For though it is not necessary to give evidence of the intent, it may be inferred, if the publication will warrant it, because it is, with all its circumstances, fully before them. The Attorney General himself did not think otherwise; on this very occasion he brought forward other papers to shew the intent. If the Jury had not the right to judge of it, why was this done? I go further, for if it was not necessary to prove the intent, it *ought not* to have been done; nor would Lord Mansfield, with all his high toned doctrine, have expressed himself as I have shewn he did. But it is said there is no use in thus conferring on Juries the rights we say they have; if it appear that the writing is not a libel, the defendant will be entitled to move in arrest, and may be allowed a writ of error on the judgment. By this train of reasoning, it will be necessary, in all cases, that the whole writing, and every circumstance relating to it, should appear on the record. Suppose it shewn at the trial, that what had been indicted as a libel, was a letter written and sent to a father for the reformation of a son; shall it not be left to a Jury to say whether this was a libel or not? The intent however cannot appear on the record, and it will be in vain to say that the judges will decide on the return of the postea. So here if the circumstances contained in another part of the publication would alter its nature, the defendant would be deprived of all the benefit which might result from it, if the Jury are not to consider the intent. Here only a par- of the publication is on the record. I do not however in this case rest our argument, on its being so explained by the subsequent part as to render its meaning at all different, from what the extract in itself purports to be. We object, and with reason too, to the conduct of the Judge, which however, we are all well assured, proceeded from the most upright intentions, we object that the Attorney General was permitted to give other numbers in evidence, and yet the defendant was prevented from adducing other things to shew the intention. For if the intent was not to be taken into consideration, the restraint ought to have been on the prosecutor as much as on the defendant. It is said in the case, that the production by the Attorney General was to shew the intent. Why produce it? In every view it must have been improper. First, as according to their principles, being against law; secondly, as allowing evidence to convict when the same evidence to acquit, was denied. I do not contend that these words, considered in themselves, were not libellous, nor that even the context would have rendered them otherwise, if the truth ought not to be received in evidence. But, I

contend, that in setting forth a libel, the Attorney General is bound to state as much as will constitute the offence, and not omit any part which would alter the substance. For although the text and context may both be libellous, yet if one vary the other it ought to appear. In actions for slander, it is sufficient to state the words that import the slander. If a man says "*you* are "a thief," the material allegation is the theft. Yet the books tell us, that if the evidence be, that in the hearing of a third person, the defendant said, "*he* is a thief," the testimony will not support the declaration. What then was the proof here? Was this a direct, and unequivocal assertion of Croswell's? No; the evidence is, "that it was the burden of the federal song." "This is wholly false." "The charge explicitly is this." This then is a totally different crime, it is not a charge from himself. It is a charge coming from the federalists. Both charges may be libels, but still there is such a difference between the two, as would have entitled him to a verdict in his favor. It is on all hands admitted, that in this case, the assertions, if not true, would have been libellous, and that the defendant would have been liable in another Court, though the present indictment is new here. But I cannot help saying, if Mr. Jefferson really did not pay Callender for libelling the father of his country, it must have been more satisfactory to him; it would have redounded more to his honor, if the Attorney General had proceeded by way of information. Then Mr. Jefferson, if he would have so far condescended, might have denied the charge upon oath. The Attorney General might then, with pride have thrown down the gauntlet; and if even the present mode was adopted, under the idea of its being derogatory for a President to make affidavits of his own innocence, still it would have been magnanimous to have heard the public prosecutor say, "my client, he who I vindicate, is too high-minded to shield his con- "duct behind the maxim which allows not the truth to be given in evidence! "He wishes it to be shewn, or otherwise is content, to stand branded as a "calumniator.

Mr. Attorney General....I offered to allow the truth to be given in evidence, and as the defendant had by his own acts moved and delayed the cause, I went into Court thinking he was ready to shew it, if able.

Harrison....It was not my intention to impeach the conduct of the Attorney General, or the President; I only meant to say, that I regretted, in a case of this kind, where the character of our chief magistrate was implicated, it had not been done. I myself have frequently been a public prosecutor, and wherever I have been engaged, never have I refused to suffer the truth to be shewn. It has however been charged and argued that it cannot, it is against this charge and this position that I have laboured, and it is on account of them, I trust, that a new trial will be awarded.

Mr. HAMILTON, on the same side.

May it please the Court,

IN rising to address your Honors at so late a period of the day, and after your attention has been so much fatigued, and the cause has been so ably handled, I may say, so exhausted, I feel a degree of embarrassment, which it is with difficulty I can surmount. I fear lest it should not be possible for me to interest the attention of the Court, on the subject on which I have to speak. Nevertheless, I have a duty to perform, of which I cannot acquit myself, but by its execution. I have however this consolation, that,

though I may fail in the attempt, I shall be justified by the importance of the question. I feel that it is of the utmost magnitude: of the highest importance viewed in every light. First, as it regards the character of the head of our nation; for, if indeed the truth can be given in evidence, and that truth, can as stated in the indictment, be established, it will be a serious truth, the effect of which it will be impossible to foresee. It is important also, as it regards the boundaries of power between the constituent parts of our constitutional tribunals, to which we are, for the law and the fact to resort; our Judges and our Juries. It is important, as it regards settling the right principles that may be applied to the case, in giving to either the one or the other, the authority destined to it, by the spirit and lettter of our law. It is important on account of the influence it must have on the rights of our citizens. Viewing it therefore in these lights, I hope I shall, in the arduous attempt, be supported by its importance, and if any doubt hangs on the mind of the Court, I shall, I trust, be able to satisfy them that a new trial ought to be had.

The question branches itself into two divisions. The first as to the truth. Whether, under a general issue of not guilty, it ought to be given in evidence. The other, as to the power of the Court, whether it has a right exclusively, over the intent, or whether *that*, and the law do not constitute one complicated fact, for the cognizance of the Jury, under the direction of the Judge. The last, I trust, can be made appear on the principles of our jurisprudence, as plainly as it is possible to evince any thing to a Court; and that in fact, there are no precedents which embrace the doctrines of the other side, or rather that they are so diverse, and contrariant, that nothing can arise from them to make an application to this case.

After these preliminary observations, and before I advance to the full discussion of this question, it may be necessasy for the safety and accuracy of investigation, a little to define what this liberty of the press is, for which we contend, and which the present doctrines of those opposed to us, are, in our opinions, calculated to destroy.

The Liberty of the Press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on government, on magistrates, or individuals. If it be not allowed, it excludes the privi-ledge of canvassing men, and our rulers. It is in vain to say, you may canvass measures. This is impossible without the right of looking to men. To say that measures can be discussed, and that there shall be no bearing on those, who are the authors of those measures, cannot be done. The very end and reason of discussion would be destroyed. Of what consequence to shew its object? why is it to be thus demonstrated, if not to show too, who is the author? It is essential to say, not only that the measure is bad and deleterious, but to hold up to the people who is the author, that, in this our free and elective government, he may be removed from the seat of power. If this be not to be done, then in vain will the voice of the people be raised against the inroads of tyranny. For, let a party but get into power, they may go on from step to step, and, in *spite* of canvassing their measures, fix themselves firmly in their seats, especially as they are never to be reproached for what they have done. This abstract mode, in practice can never be carried into effect. But, if under the qualifications I have mentioned, the power be allowed, the liberty for which I contend will operate as a salutary check. In speaking thus for the Freedom of the Press, I do not say there ought to be an unbridled licence; or that the characters of men who are

good, will naturally tend eternally to support themselves. I do not stand here to say that no shackles are to be laid on this licence.

I consider this spirit of abuse and calumny as the pest of society. I know the best of men are not exempt from the attacks of slander. Though it pleased God to bless us with the first of characters, and though it has pleased God to take him from us, and this band of calumniators, I say, that falsehood eternally repeated would have effected even his name. Drops of water in long and continued succession will wear out adamant. This therefore cannot be endured. It would be to put the best and the worst on the same level.

I contend for the liberty of publishing truth, with good motives and for justifiable ends, even though it reflect on government, magistrates, or private persons. I contend for it under the restraint of our tribunals.—When this is exceeded, let them interpose and punish. From this will follow none of those consequences so ably depicted. When, however, we do look at consequences, let me ask whether it is right that a permanent body of men, appointed by the executive, and, in some degree, always connected with it, should exclusively have the power of deciding on what shall constitute a libel on our rulers, or that they shall share it, united with a changeable body of men, chosen by the people. Let our Juries still be selected, as they now are, by lot. But it cannot be denied, that every permanent body of men is, more or less, liable to be influenced by the spirit of the existing administration: that such a body may be liable to corruption, and that they may be inclined to lean over towards party modes. No man can think more highly of our judges, and I may say personally so, of those who now preside, than myself; but I must forget what human nature is, and what her history has taught us, that permanent bodies may be so corrupted, before I can venture to assert that it cannot be. As then it may be, I do not think it safe thus to compromit our independance. For though, as individuals, they may be interested in the general welfare, yet, if once they enter into the views of government, their power may be converted into the engine of oppression. It is in vain to say that allowing them this exclusive right to declare the law, on what the Jury has found, can work no ill; for, by this privilege they can assume and modify the fact, so as to make the most innocent publication libellous. It is therefore not a security to say, that this exclusive power will but follow the law. It must be with the Jury to decide on the intent,—they must in certain cases be permitted to judge of the law, and pronounce on the combined matter of law and of fact. Passages have been adduced from Lord Mansfield's declarations to shew that judges cannot be under the influence of an administration. Yet still it would be contrary to our own experience, to say that they could not. I do not think that even as to our own country it may not be. There are always motives and reasons that may be held up. It is therefore still more necessary *here*, to mingle this power, than in England. The person who appoints *there*, is hereditary. That person cannot alone attack the judiciary; he must be united with the two houses of Lords and of Commons, in assailing the judges. But with us, it is the vibration of party. As one side or the other prevails, so of that class and temperament will be the judges of their nomination. Ask any man, however ignorant of principles of government, who constitute the judicial? he will tell you the favorites of those at the head of affairs. According then to the theory of this, our free government, the independence of our judges, is not so well secured as in England. We have *here* reasons for apprehension not applicable to them. We are not

however to be now influenced by the preference to one side or the other. But of which side soever a man may be, it interests all, to have the question settled and to uphold the power of the Jury, consistently however with liberty, and also with legal and judicial principles, fairly and rightly understood,—none of these impair that for which we contend; the right of publishing the truth, from good motives and justifiable ends, though it reflect on government, on magistrates, or individuals.

Some observations have however been made in opposition to these principles; it is said that, as no man rises at once high into office, every opportunity of canvassing his qualities and qualifications is afforded, without recourse to the press: that his first election ought to stamp the seal of merit on his name. This however is to forget how often the hypocrite goes from stage to stage of public fame, under false array, and how often when men attain the last object of their wishes, they change from that which they seemed to be. That, men the most zealous reverers of the people's rights, have, when placed on the highest seat of power, become their most deadly oppressors. It becomes, therefore, necessary to observe the actual conduct of those who are thus raised up.

I have already shewn that though libelling shall continue to be a crime, it ought to be so, only when under a restraint, in which the court and the jury shall co-operate. What is a libel that it should be otherwise? Why take it out of the rule that allows, in all criminal cases, when the issue is general, the jury to determine on the whole? What is then a libel to induce this? That great and venerable man, Lord Cambden, already cited with so much well deserved eulogy, says that he has never yet been able to form a satisfactory definition. All essays made towards it are neither accurate nor satisfactory; yet, such as they are, I shall cite them and animadvert.

Blackstone and Hawkins declare that it is any malicious defamation, with an intent to blacken the reputation of any one, dead or alive.

The criminal quality is its maliciousness. The next ingredient is, that it shall have an intent to defame. I ask then if the intent be not the very essence of the crime. It is admitted that the word falsity, when the proceedings are on the statute, must be proved to the jury, because it makes the offence. Why not then the malice, when, to constitute the crime, it must necessarily be implied. In reason there can be no difference.

A libel is then a complicated matter of fact and law, with certain things and circumstances to give them a character. If so, then the malice is to be proved. The tendency to provoke is its constituent. Must it not be shewn how and in what manner? If this is not to be the case, must every one who does not panegyrise be said to be a libeller. Unless the court are disposed to go that extreme length, it is necessary that the malice and intent must be proved. To this, it is certain the definition of Lord Coke may, in some degree, be opposed. He does seem to superadd "the "breach of the peace." Lord Coke, however, does not give this as a specific definition: and even then the defamatory writing which he particularises includes the question, both of intent and malice. The breach of the peace therefore is not made the sole, but only one of the qualities. The question is not on the breaking of the peace, but depends on time, manner, and circumstances, which must ever be questions of fact for jury determination. I do not advocate breaking the peace; observations may be made on public men, which are calculated merely to excite the attention of the community to them. To make the people exercise their own functions;

which may have no tendency to a breach of the peace, but only to inspection. For surely a man may go far in the way of reflecting on public characters, without the least design of exciting tumult. He may only have it in view, to rouse the nation to vigilance and a due exertion of their right to change their rulers. This then being a mere matter of opinion, can it be not a matter for *them* to judge of, to whom it is addressed. The court to be sure, may, like a Jury, and in common with them, have the legal power and moral discernment to determine on this; yet it does not arise out of the writing, but by adverting to the state of things and circumstances. It therefore answers no purpose to say it has a tendency to a breach of the peace.

Lord Loughborough, in the Parl. Chron. 644, 657. instances that passages from holy writ may be turned into libels.

Lord Thurlow admits that this may happen, and that time and circumstances may enter into the question. He it is true sanctioned the doctrines of our opponents, but allowed time and circumstances to be ingredients, and, strange to say, though these are extrinsic to the record, was of opinion for the old law. Lord Thurlow says, however, that it might be something more than a bare libel. Intimating here, that it may be even treason; and is it not then to confess that intent is a matter of fact? if so, who, or where shall be the forum but the jury.

My definition of a libel is, and I give it with all diffidence after the words of Lord Cambden, my definition then is this: I would call it a slanderous or ridiculous writing picture or sign, with a malicious or mischievous design or intent, towards government, magistrates, or individuals. If this definition does not embrace all that may be so called, does it not cover enough for every beneficial purpose of justice? If it have a good intent, it ought not to be a libel, for it then is an innocent transaction; and it ought to have this intent, against which the jury have in their discretion to pronounce. It shews itself to us as a sentence of fact. Crime is a matter of fact by the code of our jurisprudence. In my opinion, every specific case is a matter of fact, for the law gives the definition. It is some act in violation of law. When we come to investigate, every crime includes an intent. Murder consists in killing a man with malice propense. Manslaughter, in doing it without malice, and at the moment of an impulse of passion. Killing may even be justifiable if not praise-worthy, as in defence of chastity about to be violated. In these cases the crime is defined, and the intent is always the necessary ingredient. The crime is matter of law as far as definition is concerned; fact, as far as we are to determine its existence.

But it is said the judges have the right, on this fact, to infer the criminal intent, *that* being matter of law. This is true; but what do we mean by these words, unless the act dependant on, and united with its accessaries, such as the law has destined, and which when proved constitute the crime. But whether the Jury are to find it so, with all its qualities, is said to be a question; no act separate from circumstances can be criminal, for without these qualities it is not a crime. Thus, as I have before instanced, murder is characterised by being with malice prepense; man-slaughter, by being involuntary; justifiable homicide, by having some excuse. Killing therefore is not a crime, but it becomes so in consequence of the circumstances annexed. In cases that are in the general opinion of mankind exceptions to the explanations I have given, the law contemplates the intent. In duelling, the malice is supposed from the deliberate acts of reflecting,

sending a challenge, and appointing the time and place of meeting. Here, it is true, the law implies the intent; but then let it be remembered that it is in consequence of its having previously defined the act, and forbidden its commission. This too is on the principle of natural justice, that no man shall be the avenger of his own wrongs, especially by a deed, alike interdicted by the laws of God and of man. That therefore the intent shall in this case constitute the crime, is because the law has declared it shall be so. It is impossible to separate a crime from the intent. I call on those opposed to us to say what is a libel. To be sure they have told us that it is any scandalous publication, &c. which has a tendency to a breach of the peace. This indeed is a broad definition, which must, for the purposes of safety, be reduced to a positive fact, with a criminal intent. In this there is no violation of law; it is a settled maxim, that mens facit reum; non reus, nisi sit mens rea. When a man breaks into a house it is the intent that makes him a felon. It must be proved to the Jury that it was his intention to steal: they are the judges of whether the intent was such, or whether it was innocent. Then so, I say, should it be here; let the Jury determine, as they have the right to do, in all other cases, on the complicated circumstances of fact and intent. It may, as a general and universal rule, be asserted, that the intention is never excluded in the consideration of the crime. The only case resorted to, and which is relied on by the opposite side, (for all the others are built upon it) to shew a contrary doctrine, was a star chamber decision. To prove how plainly the intent goes to the constituting the crime of libel, the authority cited by the counsel associated with me, is fully in point. In that, the letter written to the father, though (as far as words were concerned) perfectly a libel, yet having been written for the purpose of reformation, and not with an intent to injure, was held not to amount to a libel. Suppose persons were suspected of forging public papers, and this communicated by letter to the Secretary of State, with a good design; still, if the doctrines contended for were to prevail, it would be libellous and punishable, though the party not only did it with the best of motives, but actually saved the State. In madness and idiocy, crimes may be perpetrated; nay the same malicious intent may exist, but the crime does not. These things tend to shew that the criminality of an act, is matter of fact and law combined, and on which it cannot belong to the exclusive jurisdiction of the Court to decide the intent. For the question is, for ever a question of fact.

The criminal intent, says Lord Mansfield in the Dean of St. Asaph's case, is what makes the crime.

Here truly that great man, for great he was, and no one more really estimates him than I do, yet he might have some biasses on his mind, not extremely favorable to liberty; here then he seems to favour the doctrine contended for, but he will be found to be at times contradictory, nay, even opposed to himself. "A criminal intent in doing a thing in itself criminal, without a lawful excuse, is an inference of law." How can that be *in itself* criminal, which admits of a lawful excuse? Homicide is not in itself a crime, therefore it is not correct to say, a criminal intent can be inferred, because a lawful excuse may be set up. A thing cannot be criminal, which has a lawful excuse, but as it may have a certain quality which constitutes the crime. To be sure you may go on to say, that where the intent bestows the character of criminality on an act indifferent, then it is a matter of fact, and not where the act is bad in itself. But this is begging the question. We contend that no act is criminal, abstracted, and divested of its

intent. Trespass is not in itself innocent. No man has a right to enter another's land or house. Yet it becomes in this latter case felony only in one point of view, and whether it shall be holden in that point, is a subject of Jury determination. Suppose a man should enter the apartments of the King, this in itself is harmless, but if he do it with an intent to assassinate, it is treason. To whom must this be made to appear in order to induce conviction? to the Jury. Let it rather be said that crime depends on intent, and intent is one parcel of the fact. Unless therefore it can be shewn that there is some specific character of libel, that will apply in all cases, intent, tendency, and quality, must all be matters of fact for a Jury. There is therefore nothing which can be libel, independent of circumstsnces; nothing which can be so called in opposition to time and circumstances. Lord Loughborough indeed, in the parliamentary debates on this very subject, to which I have referred the Court, admits this to be the case. Lord Mansfield, embarrassed with the truth and strength of the doctrine, endeavours to contrast meaning with intent. He says that the truth may be given in evidence to shew the meaning, but not the intent. If this can be done to shew the application where the person is imperfectly described, why not to prove the intent, without which the crime cannot be committed. Whatever is done collaterally must shew this, and in all cases collateral facts are for the Jury. The intent here has been likened to the construction of a deed, or any written instrument, in all of which the intent is for the Court. But the comparison will not hold; for even there the intent may be enquired of aliunde. When you go to qualify and explain, what is this but to decide on the intent by matters of fact? Lord Mansfield is driven into this contradiction, when, on one occasion he says it is a matter on which the Jury may exercise their judgment, and in another that it is not. I am free to confess, that in difficult cases, it is the duty of a Jury to hearken to the directions of a Judge, with very great deference. But if the meaning must be either on the face of the libel, or from any thing aliunde, then it must be a matter of fact for the Jury. That the quo animo affects the constitution of libel, cannot be disputed, and must be enquired of by some body. Now unless this is to be tried by the Jury, by whom is to be determined? Will any man say, that in the case in the Star Chamber, respecting the letter written to the child's father, the intent was not the reason why it was held innocent, and the quo animo not gone into? Did they not then endeavour to prove the guilt by the intent? Now if you are to shew things malicious aluinde, you may defend by the same means. The *mens* is the question, and in common parlance it is *that*, to which we resort to shew guilt.—11 Mod. the Queen vs. Brown, will explain how it is to be found. Nay, in this very case, when the counsel for the defendant objected to the Attorney General's reading passages from the prospectus of the Wasp, and from other numbers, he expressly avowed that he thus acted in order that the Jury might see it to be "manifest that the *intent* of the defendant was ma-"licious." This, I here observe, is a mistake that law officers would not be very apt to slide into. Yet on this very intent, this malicious intent thus proved to the Jury, and on which they founded their verdict, is the Court now asked to proceed to judgment. To demonstrate how fully this matter of intent, is by our law a subject of Jury determination, suppose the Grand Jury had in the present case returned to the bill ignoramus, on what would they have founded their return? Is not this then a precedent, that the quo animo is for a Jury. If it be necessary only to find the publication, why is not the Grand Jury competent for the whole? for if the supposition is,

that the Grand Jury may decide on the finding of the bill, surely the petit Jury may acquit. If so, then, is the case I have mentioned an important precedent. In Rex vs. Horne, an authority that has been justly urged, the principle is allowed. It appears there, that the Jury are to exercise their judgment, from the nature of the act, what is its intent. Into a confession of this is Lord Mansfield himself driven. Regina vs. Fuller, we are told from the other side, was a case on the statute for scandalum magnatum. Of this however I can find no trace in the books, and there Lord Holt repeatedly interrogated as to the truth; would have allowed it to be given in evidence, and directed the Jury that, if they did not believe the allegations false, they were not to find the defendant guilty. This then is a decision, as we contend, that not only the intent, but the truth is important to constitute the crime, and nothing has been shewn against it. Nay, Lord Holt goes on still further, he bids the Jury consider whether the papers have not a tendency to beget sedition, riot, and disturbance. Surely this authority, of that great man, demonstrates that intent and tendency, are matters of fact for a Jury. This argument will be further strengthened, when I enumerate those cases, where truth has been permitted to be shewn. But before I do that, I must examine how far truth is to be given in evidence. This depends on the intent's being a crime. Its being a truth is a reason to infer, that there was no design to injure another. Thus not to decide on it, would be injustice, as it may be material in ascertaining the intent. It is impossible to say that to judge of the quality and nature of an act, the truth is immaterial. It is inherent in the nature of things, that the assertion of truth cannot be a crime. In all systems of law this is a general axiom, but this single instance it is attempted to assert creates an exception, and is therefore an anomaly. If, however, we go on to examine what may be the case that shall be so considered, we cannot find it to be this. If we advert to the Roman law, we shall find that Paulus and Pereizius take a distinction between those truths which relate to private persons, and those in which the public are interested. Vinnius lays it down in the doctrine cited by the associate counsel who last spoke. If then we are to consider this a doctrine to be adopted in all that relates to public men, it ought now to be received. When we advert to the statutes they confirm our positions. These statutes are indisputably declaratory of the early law. We know that a great part of the common law has been, for certainty reduced to statutes. Can we suppose that the common law did not notice that no punishment was to be inflicted for speaking the truth, when we see a statute thus enacting?

Therefore, the fair reasoning is, that they are declaratory of the common law. That, by our code, falsehood must be the evidence of the libel. If we apply to precedents, they are decidedly for us. In the case cited from 7 D. and E. this is admitted, for there it is allowed, that the word false is contained in all the antient forms. This then is a strong argument, for saying that the falsity was, by the common law, considered a necessary ingredient. It is no answer to say that in declarations for assault we use the words "sticks, staves, &c." When instruments are named, this imports only one or the other which might be used, but when a word by way of epithet, that it means a precise idea, and we are to take it as if introduced for the purpose of explaining the crime. As to the practice on this occasion, we must take various epochs of the English history into consideration. That one time, that the law was as we have shewn, is proved by the statutes. At that time the truth was clearly drawn into question, and that since the

period of Lord Raymond a different practice has prevailed, is no argument against the common law. The authority from the third institute is conclusive, at least satisfactory, to shew that it was then necessary to shew the words were true. Et quid, &c. quæ litera in se continet nullam veritatem ideo, &c. Is it to be supposed that the truth in this case was not enquired into, when the want of it, is the reason of the Judgment. Unless this had been gone into, the Court would not, nor could not have spoken to it. The insertion of *that* then, is a strong argument that this was the old law, and it shew us, what that law was. In the case of the seven bishops, they were allowed to go into all the evidence they wanted. The Court permitted them to read every thing to shew it.

On that occasion Halloway and all agreed as to the admissibility of the truth. But this case is important in another view, as it shews the intent ought to be enquired into, for the bishops might have done it either with a seditious or an innocent motive. They declare that by the law they could not do the act required. They exculpated themselves by an appeal to their consciences. This shews the necessity of enquiring into the intent of the act.

In Rex vs. Fuller, this very attrocious offender was indicted for a most infamous libel, and yet Lord Holt, at every breath asked him, can you prove the truth. At the time then, when this was done, there were some things in favour of the truth. It stands then a precedent for what we contend. I shall now notice some intermediate authorities between that day and those in which a contrary principle has been endeavoured to be supported. It it true that the doctrine originated in one of the most oppressive institutions that ever existed. In a court where oppressions roused the people to demand its abolition, whose horrid judgments cannot be read without freezing the blood in one's veins. This is not used as declamation but as argument. If doctrine tends to trample on the liberty of the press, and if we see it coming from a foul sourse, it is enough to warn us against polluting the stream of our own jurisprudence. It is not true that it was abolished merely for not using the intervention of juries, or because it proceeded ex parte, though that God knows would have been reason enough, or because its functions were discharged by the court of King's Bench. It was because its decisions were cruel and tyrannical, because it bore down the liberties of the people and inflicted the most sanguinary punishments. It is impossible to read its sentences without feeling indignation against it. This will prove why there should not be a paramount tribunal to judge of these matters.

Want's case is the first we find on this subject: but even then we do not meet the broad definition of Lord Coke, in the case de famosis libellis. I do not deny this doctrine of the immateriality of the truth as a universal negative to a publication's being libellous, though true. But still I do say, that in no case, may you not shew the intent. For, whether the truth be a justification, will depend on the motives with which it was published.

Personal defects can be made public only to make a man disliked. Here then it will not be excused: it might however be given in evidence to shew the libellous degree. Still however it is a subject of enquiry. There may be a fair and honest exposure. But if he uses the weapon of truth wantonly; if for the purpose of disturbing the peace of families; if for relating that which does not appertain to official conduct, so far we say the doctrine of our opponents is correct. If their expressions are, that libellers may be punished though the matter contained in the libel be true, in these I agree. I confess that the truth is not material as a broad proposition respecting

libels. But that the truth cannot be material in any respect, is contrary to the nature of things. No tribunal, no codes, no systems can repeal or impair this law of God, for by his eternal laws it is inherent in the nature of things. We first find this large and broad position to the contrary in 5 Rep. And here it is to be noticed that when Lord Coke himself was in office, when he was Attorney General, and allowed to give his own opinion, he determines the truth to be material. But when he gets into that court, and on that bench which had pronounced against it, when he occupies a Star-Chamber seat, then he declares it is immaterial. I do not mention this as derogating from Lord Coke, for to be sure he may be said to have yielded; but this I say, is the first case on this point in which he seems to be of a contrary opinion. We do not in every respect contend even against his last ideas, we only assert that the truth may be given in evidence. But this we allow is against the subsequent authorities, which in this respect overturn the former presedents. These latter, however, are contrary to the common law; to the principles of justice, and of truth. That the doctrine, that juries shall not judge on the whole matter of law and fact, or the intent and tendency of the publication, is not to be found in the cases before the time of Lord Raymond; and it is contrary to the spirit of our law, because it may prevent them from determining on what may, perhaps, be within their own knowledge. It was only by Lord Raymond that this was first set up and acted upon, and this has been followed by Lord Mansfield and his successors. Here then have been a series of precedents against us. Blackstone too says, that the truth may not be given in evidence so as to justify: and so with the qualifications I have before mentioned do we.—Prior, indeed, to his time, Lord Holt had laid down the law in one or two cases in conformity to that of the other side, and *latter* times have given this a currency by a coincidence of precedents in its favour. A reflection may perhaps be here indulged, that, from what I have before remarked on Lord Coke, it is frequent for men to forget sound principles, and condemn the points for which they have contended. Of this the very case of the seven bishops is an example, when those, who there maintained the principles for which we contend, supplanted the persons then in power, they were ready to go the whole length of the doctrine, that the truth could not be given in evidence on a libel. This is an admonition that ought at all times to be attended to; that at all times men are disposed to forward principles to support themselves. The authority of Paley has been adduced, if indeed he may be called an authority. That moral philosopher considers every thing as slanderous libels, whether true or false, if published with motives of malice.

In these cases he does not consider the truth a justification. Nor do we; we do not say that it is alone, always a justification of the act, and this we say consistent with sound morality, is good law, and good sense. On what ought a court to decide on such an occasion as this. Shall they be shackled by precedents, weakened in that very country where they were formed? or rather shall they not say that we will trace the law up to its source. We consider, they might say, these precedents as only some extraneous bodies engrafted on the old trunk; and as such I believe they ought to be considered. I am inclined to think courts may go thus far, for it is absolutely essential to right and security that the truth should be admitted. To be sure this may lead to the purposes suggested. But my reply is, that government is to be thus treated, if it furnish reasons for calumny. I affirm that in the general course of things, the disclosure of

truth is right and prudent, when liable to the checks I have been willing it should receive as an object of animadversion.

It cannot be dangerous to government, though it may work partial difficulties. If it be not allowed, they will stand liable to encroahments on their rights. It is evident that if you cannot apply this mitigated doctrine for which I speak, to the cases of libels here, you must for ever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth was a crime; I am glad the day is come in which it is to be decided; for my soul has ever abhorred the thought, that a free man dared not speak the truth; I have for ever rejoiced when this question has been brought forward.

I come now to examine the second branch of this enquiry, the different provinces of the court and the jury. I will introduce this subject by observing that the trial by jury has been considered in the system of English jurisprudence, as the palladium of public and private liberty. In all the political disputes of that country, this has been deemed the barrier to secure the subjects from oppression. If, in that country, juries are to answer this end, if they are to protect from the weight of state prosecutions, they must have this power of judging of the intent, in order to perform their functions; they could not otherwise answer the ends of their institution. For, under this dangerous refinement of leaving them to decide only the fact of composing and publishing any thing on which they may decide, may be made a libel. I do not deny the well known maxim, that to matters of fact the jury, and to matters of law the judges shall answer. I do not deny this, because it is not necessary for the purposes of this or any other case, that it should be denied. I say, with this complicated explanation, I have before given of the manner in which the intent is necessarily interwoven in the fact, the court has the general cognisance of the law. In all cases of ancient proceedings the question of law must have been presented.

It was in civil cases alone that an attaint would lie. They have, it is said, the power to decide in criminal, on the law and the fact. They have then the right, because they cannot be restricted in its exercise; and in politics, power, and right are eqivalent. To prove it, what shall we say to this case? Suppose the legislature to have laid a tax, which by the Constitution, they certainly are entitled to impose, yet still the legislature may be guilty of oppression; but who can prevent them, or say they have not authority to raise taxes. Legal power then is the decisive effect of certain acts without controul. It is agreed that the Jury may decide against the direction of the Court, and that their verdict of acquittal cannot be impeached, but must have its effect. This, then I take to be the criterion, that the Constitution has lodged the power with them, and they have the right to exercise it. For this I could cite authorities. It is nothing to say, in opposition, to this, that they, if they act wrong, are to answer between God and their consciences. This may be said of the legislature, and yet nevertheless they have the power and the right of taxation. I do not mean to admit, that it would proper for Jurors thus to conduct themselves, but only to shew that the Jury do possess the legal right of determining on the law and the fact. What then do I conceive to be the true doctrine. That in the general distribution of power in our Constitution it is the province of the Jury to speak to fact, yet in criminal cases the consequences and tendency of acts, the law and the fact are always blended. As far as the safety of the citizen is concerned, it is necessary that the Jury shall be permitted to

speak to both. How then does the question stand, certainly not without hazard: Because, in as much as in the general distribution of power, the Jury are to be confined to fact, they ought not wantonly to depart from the advice of the Court; they ought to receive it, if there be not strong and valid reasons to the contrary, if there be, they should reject. To go beyond this is to go too far. Because, it is to say, when they are obliged to decide by their oath according to the evidence, they are bound to follow the words of the Judge. After they are satisfied from him what the law is, they have a right to apply the definition. It is convenient that it should be so. If they are convinced that the law is as stated, let them pronounce him guilty; but never let them leave that guilt for the Judge, because if they do, the victim may be offered up, and the defendant gone. Will any one say that under forms of law we may commit hommicide? will any directions from any Judge excuse them? I am free to say I would die on the rack were I to sit as a Juror, rather than confirm such a doctrine, by condemning the man I thought deserved to be acquitted: and yet I would respect the opinion of the Judge, from which however I should deem myself at liberty to depart, and this I believe to be theory of our law.

These are the propositions I shall endeavour to maintain I have little more to do than examine how far precedents accord with principles, and whether any establish a contrary doctrine. I do not know that it is necessary to do more than has already been done by my associate counsel, and yet perhaps I should not complete my duty, without adverting to what has fallen, on this point, from our opponents. There is not one of the antient precedents in which our doctrine has not in general prevailed, and it is indeed to be traced down to one of a modern date. The case of the seven bishops is that to which I allude. There it was permitted to go into the truth, and all the Court submitted the question to the Jury. This case deserves particular attention. If on the one hand it was decided at a time when the nation was considerably agitated, it was on the other hand at a time when great constitutional precedents and points were discussed and resolved. The great one was, the power of the Jury; and this power was submitted to, to extricate the people, for the salvation of the nation, from the tyranny with which they were then oppressed. This was one of the reasons which brought about their glorious revolution, and which perhaps tended to the maturing those principles which have given us ours. This ought to be considered as a land mark to our liberties, as a pillar which points out to us on what the principles of our liberty ought to rest; particularly, so if we examine it as to its nature, and the nature of the attempts then made to set up, and support the endeavours to construe an act of duty a libel. A deed, in which conscience did not permit those reverend characters to act, in any other way than, what they did, a respect to which they held a bounded duty. It is a precedent then on which we should in every way fasten ourselves. The case of Fuller is of minor importance. Yet that is one in which Lord Holt called on the defendant to enter into the truth. In the King vs. Tutchin, Lord Holt expressly tells the Jury, you are to consider whether the tendency of this writing be not to to criminate the administration; you, the Jury, are to decide on this. Owen's case is to the same effect. There Lord Cambden was of Counsel, and in the discussion in the House of Lords, he tells us, and surely his testimony is good, that being of counsel for the defendant, he was permitted to urge to the Jury a cognizance of the whole matter of libel. That in the case of Shepherd, where by his official situation, he was called on to prosecute for the

crown, where the interests of government called on him to maintain an opposite doctrine, yet then he insisted for a verdict on the whole matter, from the consideration of the Jury. In the King vs. Horne, Lord Mansfield himself tells the Jury they have a right to exercise their judgment from the nature of the intent. This surely then is a precedent down to a late period. It is not however to be denied, that there is, a series of precedents on the other side. But, as far as precedents of this kind can be supported, they can rest on precedents alone, for the fundamental rights of Juries shew, that, as by their power they can affect a question of this nature, so, politically speaking, they have the right. To ascertain this it is necessary to enquire, whether this law, now contended for, uniformly and invariably formed the practice of all the Judges in Westminster Hall. For if so, then an argument may with more propriety be raised; but if it was disputed, then it is to be doubted, Precedents ought to be such as are universally acknowledged, and this, if we are to credit the highest suthority, was not the invariable practice. Lord Loughborough says that his practice was the other way. He declares that he invariably left the whole to the Jury; and Lord Cambden gives us to understand the same thing. Here then is proof that it was not universally acquiesced in, and this, by some of the most respected characters that ever sat on a bench. Can we call this a settled practice? a practice which is contradicted by other precedents? have they not varied? I consider nothing but a uniform course of precedents, so established that the Judges invariably conform to it, in their judicial conduct as forming a precedent. When this is not the case, we must examine the precedent, and see how far it is conformable to principles of general law. If then they have not that character of uniformity, which gives force to precedents, they are not to be regarded, for they are too much opposed to fundamental principles. The Court may therefore disregard them, and say the law was never thus settled. It was a mere floating of litigated questions. Different conduct was pursued by different men, aad therefore the Court is at liberty to examine the propriety of all, and if it be convenient that a contrary mode should be adopted, we ought to examine into what has been done, for we have a right so to do, and it is our sacred duty. When we pass from this to the declaratory law of Great Britain, the whole argument is enforced by one of the first authority. I do not consider it as binding, but as an evidence of the common law. If so, I see not why we may not now hold it as evidence, of an other evidence, that the law had not been settled by a regular course of judicial precedents. On all the debates on this question, it is denied to have been so settled. It must then be confessed that if it was so, the law was one thing, and the practice another. That to put it out of doubt, was the end and object of Mr. Fox's bill. Therefore it is in evidence that the law was not settled in that country. I notice another fact, or historical evidence of this; it is what was mentioned by Lord Lansdowne, in the very debates to which I have before alluded. It is, that twenty years before, a similar act was bronght forward and dropped. Here then is a matter of fact, to shew that, in the consideration of that nation, the doctrines of Lord Mansfield were never palatable nor settled, and that the opinions of judges and lawyers, were considered by many, as not the law of the land. Let it be recollected too, that with that nation the administration of justice, in the last resort, is in the House of Lords. *That* being so, it gives extreme weight to a declaratory act, as it shews the sense of the highest branch of judicature of that country. It is in evidence that what we contend for was, and had been the law, and never was

otherwise settled. It is a very honorable thing to that country, in a case where party passions had been excited to a very great height, to see that all united to bring it in. It was first introduced by Mr. Fox, the principal officers of the crown acquiesced, the prime minister gave it his support, and in this they were aided by many of the great law Lords. All parties concurred in declaring the principles of that act, to be the law, and not only does the form prove it to be declaratory, but when the Court read the debates on that subject, they will see this to be the fact. Adding the word enacted, to a bill, does not vary the conclusion of its being declaratory. The word enacted is commonly superadded, but the word declared, is never used, but when it is intended that the act shall be considered as declaratory; and, when they insert the word declare, it is because they deem it important that it should be so understood. This I deem conclusive evidence of the intent. Thus also it was understood by all the Judges, except Lord Kenyon, and he does not say that it was not declaratory. To be sure he makes use of some expressions, that look that way; such as, "that the act had varied the old law." But not one word to show, that it was not intended, by parliament, to be a declaratory law. But it would not be surprising that Lord Kenyon, who opposed the passing of the act, should, in a judicial decision, still adhere to his old ideas. This, however, does not affect the evidence which arises from the words of the act. I join in issue then, whether this be sufficient evidence to the Court. For, I contend, that, notwithstanding the authority of Lord Kenyon, and the cases on the other side, the conclusions they maintain would be unfair. For, if these conclusions necessarily tend to the subversion of fundamental principles, though they be warranted by precedents, still the precedents ought not to weigh. But, should they have settled the law by their precedents, still *this* Court will admit any evidence, to shew that the facts are otherwise, and the law never was as they have settled it. In this case then, I say, as matters of evidence, these precedents shall not prevail, and shall not have any effect. In practice, on this declaratory act, they have gone into a construction important to our argument. But, previously to entering into this, I shall make one observation; to shew the nature of this act to be declaratory, the recital states it to be so.

Spencer, Attorney General....The whole matter *in issue* are the words.

Hamilton....Is it to be doubted that every general issue includes law and fact? Not a case in our criminal code in which it is otherwise. The construction, the publication, the meaning of the innuendoes, the intent and design, are all involved in the question of libel, and to be decided, on the plea of not guilty, which puts the whole matter in issue. It is, therefore, a subtlety to say, that the fact and law are not in issue. There can be no distinction taken even by Judges, between libels and other points. But will it be said that when this question was before the parliament, whether the law and fact should be in issue, that the parliament did not mean to give the power to decide on both? It is a mere cavil to say, that the act did not mean to decide on this very point. The opposition of the twelve Judges has been much insisted on. But in my opinion they have given up the point as to the right of the Jury to decide on the intent. They in some part of their answer assert the exclusive power of the Court; they deny in terms the power of the Jury to decide on the whole. But when pressed on this point as to a letter of a treasonable nature how do they conclude? why the very reverse of all this. Here then we see the hardship into which, the best of men are driven, when compelled to support a paradox. Can the Jury do it with power, and without right? When we say of any forum

that it can do, and may hazard the doing a thing, we admit the legal power to do it. What is meant by the word hazard? if they choose to do it, they have then the legal right. For legal power includes the legal right. This is really only a question of words. But in the exercise of this right, moral ideas are no doubt to restrain, for the conscience ought to decide between the charge, and the evidence which ought to prevail; one side or the other. The moment, however, that question, as to the power is admitted, the whole argument is given up. I consider the Judges driven to yield up, at the conclusion of their opinion, that point, for which they had, in the former parts, contended. Thus then stands the matter, on English conduct and on English precedents. Let us see if any thing in the annals of America, will further the argument. Zenger's case has been mentioned as an authority. A decision in a factious period, and reprobated at the very time. A single precedent never forms the law. If in England it was fluctuating in an English court, can a colonial Judge, of a remote colony, ever settle it? He cannot fix in New-York, what was not fixed in Great Britain. It was merely, one more precedent to a certain course of practice. But because a colonial governor exercising judicial power, subordinate to the Judges of the Mother country, decides in this way, can it be said that he can establish the law, and that he has, by a solitary precedent, fixed, what his superior could not? The most solemn decisions of the court of King's Bench are, at one time made, and at another time over-ruled. Why are our courts to be bound down by the weight of only one precedent? is a precedent like the laws of the Swedes and Persians, never to be changed. This is to make a colonial precedent, of more weight than is in England allowed to a precedent of Westminster Hall. To pursue the precedents, more emphatically our own, let us advert to the sedition law, branded indeed with epithets the most odious, but which will one day be pronounced a valuable feature in our national character. In this we find not only the intent, but the truth may be submitted to the jury, and that even in a justificatory manner. This, I affirm, was on common law principles. It would, however, be a long detail to investigate the applicability of the common law, to the constitution of the United States. It is evident, however, that parts of it, use a language which refers to former principles. The Habeas Corpus is mentioned, and as to treason, it adopts the very words of the common law. Not even the Legislature of the union can change it. Congress itself can not make constructive, or new treasons. Such is the general tenor of the constitution of the United States, that it evidently looks to antecedent law. What is, on this point, the great body of the common law? Natural law and natural reason applied to the purposes of Society. What are the English courts now doing but adopting natural law.

What have the court done here? Applied moral law to constitutional principles, and thus the judges have confirmed this construction of the common law, and therefore, I say, by our constitution it is said, the truth may be given in evidence. In vain is it to be replied that some committee met, and in their report, gave it the name of amendment. For when the act says declared, I say, the highest Legislative body in this country, have declared that the common law is, that the truth shall be given in evidence, and this I urge as a proof of what that common law is. On this point a fatal doctrine would be introduced, if we were to deny the common law, to be in force according to our Federal constitution. Some circumstances have, doubtless weakened my position. Impeachments of an extraordinary nature have echoed thro' the land. Charging as crimes things unknown,

and, although our Judges, according to that Constitution, must appeal to the definitions of the common law for treasons, crimes, and misdemeanours. This no doubt was that no vague words might be used. If then we discharge all evidence of the common law, they may be pronounced guilty ad libitum; and the crime and offence being at once at their will, there would be an end of that Constitution.

By analogy a similar construction may be made of our own Constitution, and our Judges thus got rid of. This may be of the most dangerous consequences. It admonishes us, to use with caution, these arguments against the common law. To take care how we throw down this barrier which may secure the men we have placed in power; to guard against a spirit of faction, that great bane to community, that mortal poison to our land. It is considered by all great men as the natural disease of our form of government, and therefore we ought to be careful to restrain that spirit. We have been careful that when one party comes in, it shall not be able to break down and bear away the others. If this be not so, in vain have we made Constitutions, for, if it be not so, then we must go into anarchy, and from thence to despotism and to a master. Against this I know there is an almost insurmountable obstacle in the spirit of the people. They would not submit to be thus enslaved. Every tongue, every arm would be uplifted against it; they would resist, and assist, and resist, till they hurled from their seats, those who dared make the attempt. To watch the progress of such endeavours is the office of a free press. To give us early alarm and put us on our guard against the encroachments of power. This, then, is a right of the utmost importance, one for which, instead of yielding it up, we ought rather to spill our blood. Going on, however, to precedents, I find another in the words of Chief Justice Jay, when pronouncing the law on this subject. The Jury are, in the passage already cited told, the law and the fact is for their determination, I find him telling them that it is their right. This admits of no qualification. The little, miserable conduct of the Judge in Zenger's case, when set against this, will kick the beam, and it will be seen that even the twelve judges do not set up, with deference however to their known abilities, that system now insisted on. If the doctrine for which we contend is true, in regard to treason and murder, it is equally true in respect to libel. For there is the great danger. Never can tyranny be introduced into this country by arms; these can never get rid of a popular spirit of enquiry; the only way to crush it down is by a servile tribunal. It is only by the abuse of the forms of justice that we can be enslaved. An army never can do it. For ages it can never be attempted. The spirit of the country with arms in their hands, and disciplined as a militia, would render it impossible, Every pretence that liberty can be thus invaded, is idle declamation. It is not to be endangered by a few thousands of miserable, pitiful military. It is not thus that the liberty of this country is to be destroyed. It is to be subverted only by a pretence of adhering to all the forms of law, and yet by breaking down the substance of our liberties. By devoting a wretched, but honest man as the victim of a nominal trial. It is not by murder, by an open and public execution, that he would be taken off. The sight of this, of a fellow citizen's blood would at first beget sympathy; this would rouse into action, and the people, in the madness of their revenge, would break on the heads of their oppressors, the chains they had destined for others.

One argument was stated to the Court, of a most technical and precise kind. It was that which relates to putting on the record a part only of the

libel. That on this, no writ of error would lie. What was the answer given, that it could not be presumed judges could be so unjust. Why it requires neither prejudice nor injustice, it may be matter of opinion. The argument goes to assert, that we are to take for granted the infallibility of our judges. The Court must see that some better reason must be given. That it must be shewn that this consequence cannot ensue? if not, it is decisive against the argument. Surely this question deserves a further investigation. Very truly and righteously was it once the intention of the Attorney General, that the truth should have been given in evidence. It is desireable that there should be judicial grounds to send it back again to a Jury. For surely it is not an immaterial thing that a high official character should be capable of saying any thing against the father of this country.

It is important to have it known to the men of our country, to us all, whether it be true or false; it is important to the reputation of him against whom the charge is made, that it should be examined. It will be a glorious triumph for truth, it will be happy to give it a fair chance of being brought forward; an opportunity in case of another course of things, to say, that the truth stands a chance of being the criterion of justice. Notwithstanding, however, the contrary is asserted to be the doctrine of the English Courts, I am, I confess happy to hear that the freedom of the English is allowed; that a nation, with King, Lords, and Commons, can be free. I do not mean to enter into a comparison between the freedom of the two countries. But the Attorney General has taken vast pains to celebrate Lord Mansfield's character. Never till now did I hear that his reputation was high in republican estimation; never till now did I consider him as a model for republican imitation. I do not mean however to detract from the fame of that truly great man, but, only conceived his sentiments were not those fit for a republic. No man more truly reveres his exalted fame than myself; if he had his faults, he had his virtues, and I would not only tread lightly on his ashes, but drop a tear as I passed by. He indeed seems to have been the parent of the doctrines on the other side. Such, however, we trust, will be proved not to be the doctrines of the common law, nor of this country, and that in proof of this a new trial will be granted.

FINIS.